261 N.C. App.—No. 1 Pages 1-117

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

APRIL 14, 2020

MAILING ADDRESS: The Judicial Department
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OF
NORTH CAROLINA

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[1]Sworn in 1 January 2017. [2]Sworn in 1 January 2017. [3]Appointed 24 April 2017, elected 6 November 2018, and sworn in for full term 3 January 2019. [4]Sworn in 1 January 2019. [5]Sworn in 1 January 2019. [6]Sworn in 30 April 2019. [7]Sworn in 26 April 2019. [8]Retired 31 December 2016.
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[11]Retired 31 December 2018. [12]Retired 31 December 2018. [13]Resigned 24 March 2019.

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COURT OF APPEALS

CASES REPORTED

FILED 21 AUGUST 2018

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

APPEAL AND ERROR

Driving while impaired—statutory violations—per se prejudice analysis— In a driving while impaired (DWI) case, defendant failed to show she was per se prejudiced by the magistrate's statutory violations in the absence of any evidence the State deprived defendant of access to potential witnesses or an attorney, or any argument by defendant that evidence was gathered in violation of her constitutional or statutory rights and should have been suppressed. The Court of Appeals found no grounds to grant a writ of certiorari to review the denial of defendant's motion to dismiss where defendant voluntarily pleaded guilty to DWI prior to analysis of her blood sample, she stipulated to a factual basis for the DWI, and she received the benefit of her plea bargain by having two drug charges dismissed. **State v. Ledbetter, 71**.

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Rule 59—Rule 60—request for relief—motion to amend order—abuse of discretion analysis—In an action challenging changes to a revocable trust based on allegations of undue influence, the trial court did not abuse its discretion in denying plaintiffs' postjudgment motion to amend pursuant to Rules 59 and 60 without holding a hearing where plaintiffs failed to request the proper relief under each rule. The Court of Appeals considered whether the trial court violated Rule 17 by dismissing plaintiffs' claims without first inquiring into the competency of the settlor of the trust, and concluded it did not. Plaintiffs' only showing of incompetence was based on unsubstantiated allegations and arguments, while the settlor introduced affidavits from herself and her treating physician asserting her competence. **Davis v. Rizzo, 9.**

CORPORATIONS

Judicial dissolution—rights and interest of minority shareholder—In a complex business case arising from plaintiff's termination from her family's business, the trial court did not abuse its discretion by declining to order the dissolution of the business where plaintiff failed to forecast evidence that the company was deadlocked, unprofitable, or mismanaged pursuant to N.C.G.S. § 55-14-30. Even assuming plaintiff had a reasonable expectation to receive a salary and benefits regardless of whether she performed any work for the company, the evidence showed that plaintiff received substantial dividends from her company stock, that dissolution would harm the rights and interests of other shareholders, and that nothing precluded plaintiff from selling her interest in the company. **Brady v. Van Vlaanderen, 1.**

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Standing—insurance company—automobile accident—An insurance company had standing to seek a declaratory judgment under N.C.G.S. § 1-257 as to coverage obligations arising from an automobile accident and an underlying tort action. **Smith v. USAA Cas. Ins. Co., 40.**

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Equitable distribution—marital property—unequal distribution—liquid assets—In an equitable distribution action that was remanded for errors in classification and valuation of the parties' property, the trial court also abused its discretion in ordering an unequal distribution of marital property using the distributional factors in N.C.G.S. § 50-20(c) without a proper valuation of marital assets and upon a misunderstanding of the difference between liquid and nonliquid assets. **Watson v. Watson, 94.**

Equitable distribution—valuation—car—In an equitable distribution action, the trial court erred in valuing a Cadillac El Dorado at $10,000 as of the date of separation where there was no evidence to support that valuation as the fair market value on the date of separation, and where the only evidence appeared to be that the car's value was $1,880 on the relevant date. **Watson v. Watson, 94.**

Equitable distribution—valuation—home equity—401(k)—In an equitable distribution action, the trial court's determination that an unequal distribution was equitable was not based on a proper classification and valuation of assets, including a home equity line of credit (HELOC) taken out by the husband and the husband's 401(k). The trial court classified the HELOC as a separate debt but then stated there was no evidence of its value despite not needing to distribute it; conversely, the trial court classified the 401(k) as marital debt but did not value it, as it would need to do before distribution. Finally, where the trial court erroneously found the parties separated in 2007, and not 2009, its determination that there was no evidence of the value of the 401(k) at the date of separation despite a letter from the plan administrator dated 2009 with the account's value may or may have been prejudicial, depending on whether the court chose not to rely on the letter for a reason other than the misapprehension about the correct date of separation. There is no way to know if an unequal distribution of the marital estate is equitable if there is no finding on the net value of the entire marital estate. **Watson v. Watson, 94.**

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Hearsay—exceptions—residual—notice—Where the trial court admitted under the hearsay rule's residual exception out-of-court statements by defendant's daughters regarding his sexual abuse of them, the State provided sufficient notice of the statements—which had already been provided to defendant months earlier—by sending written notice between 1 week and 7 months before the statements were introduced at the various court proceedings on the matter. **In re W.H., 24.**

Hearsay—exceptions—residual—trustworthiness—Where the trial court admitted under the hearsay rule's residual exception out-of-court statements by defendant's daughters regarding his sexual abuse of them, the trial court did not abuse its discretion in determining the statements were trustworthy. Even though the trial court's findings failed to mention that the daughters recanted their allegations, this failure was not fatal, and the trial court made numerous findings in determining the statements were trustworthy. **In re W.H., 24.**

Hearsay—exceptions—residual—unavailability—Where the trial court admitted under the hearsay rule's residual exception out-of-court statements by defendant's daughters regarding his sexual abuse of them, the trial court did not err by determining that the daughters were unavailable to testify on the grounds that testifying would traumatize them, would cause them confusion, and would create a risk that they would be untruthful out of guilt and fear. These findings were not inconsistent with the finding that their out-of-court statements were trustworthy. **In re W.H., 24.**

Photographs of firearms, weapons, surveillance equipment—irrelevant—prejudice outweighed by other evidence—In a stalking prosecution, photographs of legally owned firearms, ammunition, and surveillance equipment found in defendant's home were irrelevant, and the probative value of the evidence was outweighed by the danger of unfair prejudice. The trial court abused its discretion in admitting the photographs; however, in light of the overwhelming other evidence, the admission of the photographs did not amount to prejudicial error. **State v. Hobson, 60.**

Relevance—prejudicial and probative value—unrelated sexual assault—In defendant's trial for sexual offenses committed against his daughter, the trial court did not err by excluding defendant's proposed testimony concerning the rape of his other daughter by a neighbor, under Rules of Evidence 401 and 403. Defendant failed to show how the testimony would have a logical tendency to prove that he did not molest his daughter or how his wife's reporting of the rape by the neighbor would make her more likely to report the molestation by her husband; further, the testimony likely would have confused the jury. **State v. Alonzo, 51.**

Stalking prosecution—domestic violence protective order—redacted—prejudice analysis—The trial court did not abuse its discretion in a stalking prosecution by admitting domestic violence protective orders and related findings where the trial court redacted the orders and gave limiting instructions. **State v. Hobson, 60.**

Stalking—testimony of incidents with another woman—plain error analysis—The trial court did not plainly err in a stalking prosecution by admitting the testimony of defendant's prior girlfriend regarding his assault on her, and relating her communications with the prosecuting victim, where the challenged portions of the prior girlfriend's testimony were relevant not only to show defendant's propensity for stalking but to show that the prosecuting victim was in reasonable fear of defendant. **State v. Hobson, 60.**

SCHEDULE FOR HEARING APPEALS DURING 2020

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks:

January 6 and 20 (20th Holiday)

February 3 and 17

March 2, 16 and 30

April 13 and 27

May 11 and 25 (25th Holiday)

June 8

July None Scheduled

August 10 and 24

September 7 (7th Holiday) and 21

October 5 and 19

November 2, 16 and 30

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

PATRICIA M. BRADY, PLAINTIFF

v.

BRYANT C. VAN VLAANDEREN; RENEE M. VAN VLAANDEREN; MARC S. TOWNSEND; LINDA M. TOWNSEND; UNITED TOOL & STAMPING COMPANY OF NORTH CAROLINA, INC.; UNITED REALTY OF NORTH CAROLINA, LLC; ENTERPRISE REALTY, LLC; AND WATERS EDGE TOWN APARTMENTS, LLC, DEFENDANTS

No. COA18-61

Filed 21 August 2018

Corporations—judicial dissolution—rights and interest of minority shareholder

In a complex business case arising from plaintiff's termination from her family's business, the trial court did not abuse its discretion by declining to order the dissolution of the business where plaintiff failed to forecast evidence that the company was deadlocked, unprofitable, or mismanaged pursuant to N.C.G.S. § 55-14-30. Even assuming plaintiff had a reasonable expectation to receive a salary and benefits regardless of whether she performed any work for the company, the evidence showed that plaintiff received substantial dividends from her company stock, that dissolution would harm the rights and interests of other shareholders, and that nothing precluded plaintiff from selling her interest in the company.

Appeal by plaintiff from order and opinion entered 25 July 2016 by Business Court Judge James L. Gale in Cumberland County Superior Court. Heard in the Court of Appeals 9 August 2018.

Bain & McRae, LLP, by Edgar R. Bain and Ryan McKaig, for plaintiff-appellant.

Shanahan McDougal, PLLC, by Kieran J. Shanahan, Brandon S. Neuman and Jeffrey M. Kelly, for defendants-appellees.

TYSON, Judge.

Patricia M. Brady ("Plaintiff") appeals from the Business Court order granting summary judgment in favor of Defendants. We affirm.

I. Background

United Tool & Stamping Company of North Carolina, Inc. ("United Tool") is a metal stamping business located in Fayetteville. In June 1996, United Tool was incorporated in North Carolina. Anthony Moschella, Plaintiff's father, served as President. Day-to-day management was handled by Plaintiff's brothers-in-law, Defendants Bryant Van Vlaanderen and Marc Townsend.

In December 1996, United Tool amended its articles of incorporation and created two classes of stock: 100 shares of Voting Common stock and 900 shares of Non-Voting Common stock. The Non-Voting stock provided for pro-rata participation in any dividends declared by United Tool, but contained no voting rights. The Non-Voting stock was divided equally among three of Moschella's daughters—Plaintiff and Defendants Linda Townsend and Renee Van Vlaanderen—and their husbands, with each taking a one-sixth interest. As part of her divorce settlement from her first husband in 2002, Plaintiff acquired his shares. Anthony Moschella retained all of United Tool's Voting Common stock.

Plaintiff was initially employed by United Tool in 2001 and was paid a weekly salary to work in the offices and assist with administrative tasks. Plaintiff worked for United Tool until May 2005. She stopped going in to work once her second husband, Tim Brady, was employed at United Tool. Moschella terminated Plaintiff's employment and medical insurance on 31 May 2005. Plaintiff continued to receive her pro-rata share of United Tool's dividend distributions, but received no salary or other benefits.

In March 2007, Moschella approved Plaintiff's rehiring at United Tool. Defendants Renee Van Vlaanderen and Linda Townsend were also hired to work at United Tool at that time. In 2008, Plaintiff became "pretty sick" and was diagnosed with a variety of medical problems, including

seizures. Plaintiff was absent from work for an extended period of time and did not come in to work regularly for years.

In December 2011, Moschella decided to sell his Voting Common stock to United Tool. On 2 January 2012, United Tool acquired all of Moschella's Voting Common stock. All shares of Non-Voting Common stock became Voting Common stock. Plaintiff and the individually named Defendants became the holders of Voting Common stock.

Tim Brady was fired from United Tool and Plaintiff's salary was increased. After this salary increase, Plaintiff became more involved, coming in to the office more frequently and participating in shareholder meetings. Plaintiff was told her salary and benefits were dependent upon her work with the company.

Plaintiff requested access to the corporate records of Defendants Enterprise Realty and United Realty. On 14 May 2012, Plaintiff's counsel sent a letter requesting a meeting where Plaintiff could review the corporate records. At the meeting on 24 May 2012, Plaintiff and her counsel inquired into Plaintiff's employment status and salary. Plaintiff's employment was terminated after the meeting on 24 May 2012.

Plaintiff filed a complaint on 24 August 2012. The case was designated as a complex business case by the Chief Justice of North Carolina on 4 September 2012. Defendants filed a motion to dismiss, which was partially granted on 1 August 2013. Both parties filed motions for summary judgment. After hearing oral arguments, the Business Court granted Defendants' motion for summary judgment on 25 July 2016. Plaintiff timely filed notice of appeal.

II. Jurisdiction

Appeal lies of right in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2013). This case was designated as a complex business case on 4 September 2012, prior to the effective date of the 2014 amendments designating a right of direct appeal from a final judgment of the Business Court to the Supreme Court of North Carolina. *See* 2014 N.C. Sess. Laws 621, ch. 102, § 1. This appeal is properly before us.

III. Issues

Plaintiff argues the Business Court erred by failing to apply the plain meaning of N.C. Gen. Stat. § 55-14-30, and by failing to order judicial dissolution. Plaintiff also argues the Business Court erred in considering equitable factors beyond the equities of the shareholders.

IV. Standards of Review

"Our standard of review on appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

> A defendant may show entitlement to summary judgment by (1) proving that an essential element of the plaintiff's case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense.

Draughon v. Harnett Cty. Bd. of Educ., 158 N.C. App. 705, 708, 582 S.E.2d 343, 345 (2003) (citation and internal quotation marks omitted), *aff'd per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004).

Judicial dissolution is a remedy that rests "within the trial court's sound discretion." *Royals v. Piedmont Elec. Repair Co.*, 137 N.C. App. 700, 704, 529 S.E.2d 515, 518 (2000). A finding that dissolution is not appropriate is reviewed for abuse of discretion. *Id.*

V. Analysis

A. Judicial Dissolution

To secure a decree of judicial dissolution a plaintiff must demonstrate:

> (1) [s]he had one or more substantial reasonable expectations known or assumed by the other participants; (2) the expectation has been frustrated; (3) the frustration was without fault of the plaintiff and was in large part beyond [her] control; and (4) under all of the circumstances of the case, plaintiff is entitled to some form of equitable relief.

Meiselman v. Meiselman, 309 N.C. 279, 301, 307 S.E.2d 551, 564 (1983).

"When a minority shareholder . . . brings suit for involuntary dissolution or alternative relief, [s]he has the burden of proving that [her] 'rights or interests' as a shareholder are being contravened. Russell M. Robinson, II, *Robinson on North Carolina Corporation Law* § 28.11 (7 ed. 2017). A plaintiff is not entitled to dissolution "at the expense of the corporation *and* without regard to the rights and interests of the other shareholders." *Meiselman*, 309 N.C. at 297, 307 S.E.2d at 562 (emphasis

supplied). A court possesses the authority to judicially dissolve a corporation when "liquidation is reasonably necessary for the protection of the rights or interests of the complaining shareholder." N.C. Gen. Stat. § 55-14-30(2) (2017).

Plaintiff argues the evidence tends to show she held "substantial reasonable expectations" to receive a salary and benefits, regardless of whether she performed services for United Tool. *See Meiselman*, 309 N.C. at 301, 307 S.E.2d at 564. Presuming Plaintiff did maintain such reasonable expectations, the Business Court concluded such expectation "does not justify the equitable remedy of a decree compelling judicial dissolution of United Tool."

The record indicates United Tool continues to operate at a profit, and Plaintiff continues to receive "substantial dividends" as a shareholder. As such, Plaintiff's evidence fails to forecast evidence tending to show or suggest United Tool's management is deadlocked, the company is unprofitable, or its assets are being mismanaged, to support an order for dissolution. *See id.*

Plaintiff contends the Business Court incorrectly interpreted the plain meaning of N.C. Gen. Stat. § 55-14-30 and failed to recognize it had the authority to grant the relief she sought: to appoint a receiver and to sell the company. In its opinion and order the Business Court stated: "The Court need not consider whether it might award any alternative equitable remedy, because it does not have the power to do so." The Court was responding to Plaintiff's general comment that realistically she was not seeking a dissolution of United Tool, but prefers an alternative remedy, such as United Tool buying out her ownership interest.

The only equitable remedy a trial court may award is dissolution. N.C. Gen. Stat. § 55-14-30(2). A forced buyout of shares by the corporation could be triggered only if and after the court concludes judicial dissolution is an appropriate remedy. N.C. Gen. Stat. § 55-14-31(d) (2017). No equitable remedial powers allow a judge to compel Defendants to reinstate Plaintiff's employment, as Plaintiff's counsel conceded at oral argument. *See Coleman v. Coleman*, 2015 NCBC 110, 2015 WL 8539036, at *3 (citing *Robinson on North Carolina Corp. Law* § 28.11).

Plaintiff spoke at length about what may happen to the corporation *after* dissolution, claiming the court had failed to recognize its authority. This assertion is not supported by the record. Instead, the record shows the court found and concluded a decree of judicial dissolution was not justified because Plaintiff had received substantial dividends, and that dissolution would harm "the rights and interests of the other

shareholders." *Meiselman*, 309 N.C. at 297, 307 S.E.2d at 562. The court found in the exercise of its discretion that judicial dissolution of United Tool was not justified. Plaintiff's assertions or forecasts of what may occur following a purported dissolution is immaterial.

Nothing in the record indicates Plaintiff is precluded from selling her shares or interest. There are no restrictions imposed upon Plaintiff to prevent her from selling her shares, and the individual Defendants reached an agreement allowing the disclosure of information to potential buyers.

Plaintiff failed to show the Business Court abused its discretion in declining to order judicial dissolution of United Tool in this case. Plaintiff's arguments are overruled.

B. Additional Equitable Factors

Plaintiff argues the Business Court erred in considering the possible effects of dissolution on United Tool's employees. Under the *Meiselman* standard, she asserts the court should have only considered the impact of dissolution upon the shareholders. *See Meiselman*, 309 N.C. at 297, 307 S.E.2d at 562. Plaintiff contends the issue of whether the trial court should consider equitable factors beyond the equities between and concerning the shareholders is a question of law to be reviewed *de novo*. There is little appellate guidance on what this Court should consider on appeal when reviewing the equities of judicial dissolution analysis.

Plaintiff continues to argue that her proposed remedy, the dissolution and sale of the entire company, would preserve the jobs of the employees, as whoever purchases the company would want to retain the employees to preserve the profits from United Tool. Further, Plaintiff contends the General Assembly and the Supreme Court of North Carolina only intended to protect the rights and interests of the minority shareholder, not to "provide job security for every employee of a company in which minority oppression is occurring."

Defendants reject and counter this argument and analysis. They argue it is reasonable for the court to at least nominally consider key stakeholders in the dissolution determination in addition to the equities of the company and all shareholders. Defendants contend the proper application of *Meiselman* requires "the familiar balancing process and flexible remedial resources of courts of equity" in establishing its test for dissolution, considering whether "under all of the circumstances of the case plaintiff is entitled to some form of equitable relief." *Meiselman*, 309 N.C. at 297, 301, 307 S.E.2d at 562, 564 (citation and internal quotation marks omitted).

Defendants also cite to the Business Court's consideration of third parties in similar cases. The Business Court has considered, *inter alia*, the nature of the business, impacts on employees and others, the relationships between the parties, and recent corporate actions. *See Royals v. Piedmont Elec. Repair Co.*, 1999 NCBC 1, 1999 WL 33545516, at *6, *aff'd on other grounds*, 137 N.C. App. 700, 529 S.E.2d 515 (2000).

The Business Court's analytic framework in *Royals* cites to a Mississippi law journal article as persuasive authority, and has applied that consistent framework to many other cases when addressing *Meiselman* claims. *See John Henegan*, *Comment*, *Oppression of Minority Shareholders: A Proposed Model and Suggested Remedies*, 47 Miss. L.J. 476, 488-93 (1976); *see also Joalpe-Industria de Expositores, S.A. v. Alves*, 2015 NCBC 9A, 2015 WL 428333, at *8; *see also High Point Bank & Tr. Co. v. Sapona Mfg. Co.*, 2010 NCBC 11, 2010 WL 2507524, at *13, *aff'd on other grounds*, 212 N.C. App. 148, 713 S.E.2d 12 (2011).

Other long standing equitable and discretionary factors include: the party's clean hands, the adequacy of remedies at law, the person who seeks equity must do equity, and the avoidance of long-term entanglement of judicial resources. *See Creech v. Melnik*, 347 N.C. 520, 529, 495 S.E.2d 907, 913 (1998) ("One who seeks equity must do equity. The fundamental maxim, 'He who comes into equity must come with clean hands,' is a well-established foundation principle upon which the equity powers of the courts of North Carolina rest." (citation omitted)); *see also Moore v. Moore*, 297 N.C. 14, 16, 252 S.E.2d 735, 737 (1979) ("Equity seeks to reach and do complete justice where courts of law, through the inflexibility of their rules and want of power to adapt their judgments to the special circumstances of the case, are incompetent so to do." (citation and internal quotation marks omitted)).

Defendants also cite to this Court's prior treatment of the equitable balancing of third parties by the trial courts. In *Foster v. Foster Farms*, this Court concluded the trial court had "carefully weighed the consequences of each course of action it was authorized to take before deciding to liquidate the corporation." 112 N.C. App. 700, 711, 436 S.E.2d 843, 850 (1993). The trial court found and concluded liquidation was appropriate because ongoing operations would cause "stress on [the] families[.]" *Id.*

Further, in *Royals*, this Court considered the interests of a testamentary trust beneficiary and acknowledged "[t]he only way these shares will ever produce any money for her is if they are liquidated." 137 N.C. App. at 709, 529 S.E.2d at 521.

Plaintiff requests this Court to independently address and answer this question, and not to rely upon business court cases and "law review articles from foreign jurisdictions." Plaintiff contends that the "North Carolina model," as embodied in *Meiselman* and its progeny, should focus *solely* on the shareholders, and not third parties. She asserts the only people possibly harmed by the dissolution of the company would be the individual Defendants, and they could avoid such harm by buying out her shares. Plaintiff's argument on this issue relies upon her arguments in the previous issue. As noted, Plaintiff is free to sell her shares in a profitable and going concern, and is not under any restrictions to prevent her from doing so. Plaintiff has failed to show any abuse of discretion by the trial court in declining to order judicial dissolution.

VI. Conclusion

Under *de novo* review on summary judgment, this Court is empowered to further establish the legal analysis and considerations to guide the trial court's decisions in judicial dissolutions. It is unnecessary for us to do so under these facts, as Plaintiff has failed to show any basis for us to conclude the Business Court abused its discretion in not ordering judicial dissolution of United Tool.

The court's exercise of discretion and conclusion to decline dissolution is supported by the unrefuted evidence, even without considering the impact upon the employees and other third parties. The judgment appealed from is affirmed. *It is so ordered.*

AFFIRMED.

Judges DIETZ and BERGER concur.

DAVIS v. RIZZO

[261 N.C. App. 9 (2018)]

REBECCA R. DAVIS AND MATTHEW M. DAVIS, INDIVIDUALLY AND ON BEHALF OF JEANETTE B. DAVIS, TRUSTOR OF THE JEANETTE B. DAVIS REVOCABLE TRUST DATED MARCH 11, 2002; AND MATTHEW M. DAVIS, ON BEHALF OF HIS CHILDREN, MALLORY FAY DAVIS AND MATTHEW MCCABE DAVIS, JR., PLAINTIFFS

v.

JANET D. RIZZO, INDIVIDUALLY AND AS TRUSTEE OF THE JEANETTE B. DAVIS REVOCABLE TRUST DATED MARCH 11, 2002; ANNE PAGE WATSON; AND INTERVENOR JEANETTE B. DAVIS, DEFENDANTS

No. COA17-1153

Filed 21 August 2018

1. Civil Procedure—Rule 59—motion to amend—interlocutory order—validity of request

In an action challenging changes to a revocable trust based on allegations of undue influence, the Court of Appeals declined to exercise its discretion and treat plaintiffs' untimely appeal (from orders allowing a party to intervene, denying plaintiffs' motion to stay the proceedings, and granting defendants' motions to dismiss) as a writ of certiorari after determining that plaintiffs' motion to amend the trial court's orders did not adequately request valid Rule 59(e) relief. Plaintiffs' request for relief was not within the trial court's jurisdiction to grant where they asked for reconsideration of the interlocutory portion of the decision and not of the final judgment dismissing their claims, and reargued issues already addressed.

2. Civil Procedure—Rule 59—Rule 60—request for relief—motion to amend order—abuse of discretion analysis

In an action challenging changes to a revocable trust based on allegations of undue influence, the trial court did not abuse its discretion in denying plaintiffs' postjudgment motion to amend pursuant to Rules 59 and 60 without holding a hearing where plaintiffs failed to request the proper relief under each rule. The Court of Appeals considered whether the trial court violated Rule 17 by dismissing plaintiffs' claims without first inquiring into the competency of the settlor of the trust, and concluded it did not. Plaintiffs' only showing of incompetence was based on unsubstantiated allegations and arguments, while the settlor introduced affidavits from herself and her treating physician asserting her competence.

Appeal by plaintiffs from orders entered 28 March, 18 April, and 12 May 2017 by Judge Beecher R. Gray in Durham County Superior Court. Heard in the Court of Appeals 18 April 2018.

Law Offices of Hayes Hofler, P.A., by R. Hayes Hofler, III; and Muller Law Firm, PLLC, by Tara Davidson Muller, for plaintiff-appellants Rebecca R. Davis and Matthew M. Davis.

Young Moore and Henderson, P.A., by John N. Hutson, Jr., and Angela Farag Craddock, for defendant-appellee Janet D. Rizzo.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Gary S. Parsons and Jessica B. Thaller-Moran, for defendant-appellee Anne Page Watson.

McPherson, Rocamora, Nicholson & Wilson, PLLC, by Catherine L. Wilson, for intervenor-defendant-appellee Jeanette B. Davis.

ELMORE, Judge.

Plaintiffs Rebecca R. Davis ("Rebecca") and Matthew M. Davis ("Matthew") (collectively, "plaintiffs"), daughter-in-law and grandson to ninety-nine-year-old Jeanette B. Davis ("Mrs. Davis"), brought this action, individually as expected beneficiaries of Mrs. Davis's 11 March 2002 revocable trust ("2002 Revocable Trust") and on Mrs. Davis's behalf as settlor of that trust, against defendants Janet D. Rizzo ("Rizzo"), who is Mrs. Davis's daughter, and Anne Page Watson ("Attorney Watson"), who was one of Mrs. Davis's estate planning attorneys. Plaintiffs alleged that Mrs. Davis's mental health has been deteriorating since 2010, and Rizzo has been exerting undue influence on her, thereby invalidating Mrs. Davis's estate planning decisions from 2014 to 2016, including executing a general power-of-attorney appointing Rizzo as her lawful attorney-in-fact; creating a new trust ("2016 Trust"); and transferring two parcels of real property held in her 2002 Revocable Trust to Rizzo, as trustee of the 2016 Trust. Following Mrs. Davis's motion to intervene as a party-defendant in the action, the trial court entered an order denying plaintiffs' motion to continue or stay proceedings, and granting Mrs. Davis's, Rizzo's, and Attorney Watson's (collectively, "defendants") motions to dismiss plaintiffs' claims under our Civil Procedure Rule 12(b)(6).

After the trial court denied plaintiffs' postjudgment motion to amend that order pursuant to Civil Procedure Rules 59 and 60, plaintiffs filed notices of appeal from the trial court's orders (1) allowing Mrs. Davis to intervene as a party-defendant; (2) denying their motion to continue or stay proceedings, and dismissing their claims; and (3) denying their motion to amend the second order. In response, defendants have filed

a motion to dismiss plaintiffs' appeals from the first two orders, arguing they violated our Appellate Procedure Rule 3(c)'s thirty-day jurisdictional time limit to take appeal, and that their postjudgment motion to amend did not toll this time because it was not a proper Rule 59 motion. *See* N.C. R. App. P. 3(c)(1), -(3).

Because we agree the motion to amend did not constitute a proper Rule 59 motion sufficient to toll the appeal clock, we allow defendants' motion to dismiss plaintiffs' untimely appeals from the first two orders for lack of jurisdiction. Additionally, because plaintiffs have failed to demonstrate the trial court abused its discretion in denying their motion to amend, we affirm the third order.

I. Background

Ninety-nine-year-old Mrs. Davis and her late husband, Haywood Davis, Sr. ("Haywood, Sr."), had two children together, defendant Rizzo and Haywood Davis, Jr. ("Haywood, Jr."). Haywood, Jr. and his wife, Rebecca, had one child, Matthew.

On 8 February 2017, plaintiffs Rebecca and Matthew, Mrs. Davis's daughter-in-law and grandson, individually as expected beneficiaries of Mrs. Davis's 2002 Revocable Trust and on Mrs. Davis's behalf as trustor of that trust, sued Rizzo, who is Mrs. Davis's only surviving child, and Attorney Watson, who was one of Mrs. Davis's estate planning attorneys. Plaintiffs asserted claims sounding in constructive fraud and breach of fiduciary duty, actual fraud, and undue influence.

According to plaintiffs' complaint, a few years after her late husband Haywood, Sr.'s death, Mrs. Davis on 11 March 2002 created the 2002 Revocable Trust, later revised on 28 December 2010, naming herself as initial trustee and listing her two children, Rizzo and Haywood, Jr., as equal trust fund beneficiaries. The 2002 Revocable Trust provided that if Mrs. Davis's children should predecease her, Haywood, Jr.'s fifty percent share would be distributed equally between his wife, Rebecca, and their son, Matthew; and Rizzo's fifty percent share would be distributed equally to her children. At that time, Mrs. Davis's estate planning attorney, Rupe S. Gill ("Attorney Gill"), was named as first-successor trustee, and two parcels of real property were held in the 2002 Revocable Trust.

However, plaintiffs' complaint alleged, four months after Haywood, Jr.'s death in 2014, Rizzo brought Mrs. Davis to Attorney Gill's office, where Rizzo exerted undue influence on Mrs. Davis to make certain revisions to her 2002 Revocable Trust, including replacing Attorney Gill with Rizzo as first-successor trustee and naming Attorney Gill as special

co-trustee, and to execute a general power-of-attorney appointing Rizzo as her lawful attorney-in-fact. On 16 July 2015, Rizzo brought Mrs. Davis to defendant Attorney Watson's office, where Rizzo again exerted undue influence on Mrs. Davis to revise her 2002 Revocable Trust by removing Attorney Gill as special co-trustee. On 25 July 2016, Rizzo returned Mrs. Davis to Attorney Watson's office, where Rizzo again exerted undue influence on her to create a new trust, the 2016 Trust, naming Rizzo as trustee. That same day, Rizzo exerted undue influence on Mrs. Davis to convey by general warranty deeds, as trustee of her 2002 Revocable Trust, the two properties previously held in the 2002 Revocable Trust to Rizzo, as trustee of the 2016 Trust.

Plaintiffs further alleged in their complaint that after Mrs. Davis revised her 2002 Revocable Trust in 2010, her "mental health deteriorated" and her "medical records show that [i]n recent years she has been suffering from . . . impaired mental capacity, altered mental status, confusion, and memory loss"; that "when [Mrs. Davis] signed trust-related documents and deeds during the period from 2014 through 2016, she had diminished mental capacity and was under the undue influence of her daughter, [Rizzo]"; and that Mrs. Davis "is a real party in interest and a necessary party . . . but lacks sufficient mental capacity to represent herself in these proceedings." Therefore, plaintiffs requested, *inter alia*, "a guardian ad litem be appointed to represent [Mrs. Davis's] interests . . . as soon as is practicable."

On 22 February 2017, Mrs. Davis filed a verified motion to intervene as a party-defendant in the action and to stay proceedings. Attached to her motion were affidavits from Mrs. Davis and her treating physician of the last seven years, Dr. Allison K. Gard. Mrs. Davis in her affidavit stated: "I have never been adjudicated to be incompetent," and "I am competent." Dr. Gard in her affidavit stated that she performed two "Mini-Mental Status Examination[s]" on Mrs. Davis in February 2017 and September 2016, who "scored 28 out of 30" on both tests. Dr. Gard also stated: "[B]ased upon my personal observation of Mrs. Davis, I do not find any reason why she cannot be in charge of her own affairs[,]" and that she "is one of the highest functioning 98-year-olds that I have had the pleasure to know."

That same day, Mrs. Davis moved under our Civil Procedure Rule 12(b)(6) to dismiss plaintiffs' action, arguing that because she is alive and her 2002 Revocable Trust is revocable, (1) plaintiffs lacked standing to sue as either non-settlor beneficiaries of her 2002 Revocable Trust, or on her behalf as trustor of that trust; (2) there was no justiciable controversy; and (3) plaintiffs' complaint failed to allege a viable claim

for damages. On 7 and 8 March 2017, defendants Rizzo and Attorney Watson, respectively, filed their answers and defenses, moving under, *inter alia*, Rule 12(b)(1) and -(b)(6) to dismiss plaintiffs' complaint for lack of standing and for failure to state a claim for relief. Defendants' dismissal motions were consolidated for hearing on 14 March.

On 13 March, one day before the scheduled hearing, plaintiffs filed a motion to continue or stay proceedings. In their motion, plaintiffs argued there were "threshold issues . . . which must be decided before the Court can proceed to a merits adjudication of the multiple motions to dismiss . . . suddenly scheduled for hearing[,]" including "[w]hether Mrs. Davis had insufficient mental capacity to knowingly execute the 2016 Trust and the two deeds that conveyed valuable real properties from the 2002 Trust to the 2016 Trust[,]" and "[w]hether Mrs. Davis has insufficient mental capacity now, such that a guardian *ad litem* needs to be appointed to represent her interests in this case before any substantive litigation is allowed to proceed." Plaintiffs alleged they hired a "neuropsychiatrist, Dr. Thomas Gualtieri, to review Mrs. Davis's medical record to tell whether mental incapacity exists in Mrs. Davis"; that "Dr. Gualiteri would have to determine whether it would be necessary to proceed with an independent medical examination of Mrs. Davis"; and that "[a] hearing would then have to be held for the court to determine whether a guardian ad litem is required to represent Mrs. Davis' interests in this litigation." Accordingly, plaintiffs requested, *inter alia*, "[a]ll of the dispositive motions be reset for hearing after review of Mrs. Davis' medical record and examination by Dr. Gualtieri if necessary[.]"

After the 14 March consolidated hearing on the parties' motions, the trial court entered orders (1) allowing Mrs. Davis's motion to intervene as a party-defendant ("intervention order"); and (2) denying plaintiffs' motion to continue or stay proceedings, and granting defendants' motions to dismiss the claims under Rule 12(b)(6) ("stay/dismissal order"). The stay/dismissal order was entered on 23 March 2017 and, within ten days after its entry, plaintiffs filed a timely motion styled "motion to amend order" pursuant to Rule 59(a)(1), -(a)(3), and -(a)(8), as well as Rule 60(b)(1) and -(b)(6).

In their motion to amend, plaintiffs again argued they "raised substantial issues which have not been answered in this case[,]" including "[w]hether [Mrs.] Davis had sufficient mental capacity to knowingly execute certain trust documents[,]" and "[w]hether she had sufficient mental capacity to proceed as a party in this case without the appointment of a guardian ad litem[.]" Plaintiffs again alleged they hired Dr. Gualiteri to assess Mrs. Davis's mental capacity but that he has been unable to do so

because he has not been able to review Mrs. Davis's medical records or examine her, allegations supported by Dr. Gualtieri's affidavit attached to the motion. Plaintiffs further alleged "[t]he order of dismissal of this case can be amended to include the relief prayed for herein without disturbing the finality of the dismissal order," and requested the trial court grant the following relevant relief: (1) "Allow Dr. Gualtieri to perform an independent medical examination of [Mrs.] Davis personally"; (2) "[r]elease the complete medical records of [Mrs.] Davis for the last ten (10) years for Dr. Gualtieri's review"; and (3) "[a]llow plaintiffs to be reunited with Mrs. Davis on a regular basis before she passes[.]"

On 12 May 2017, without holding a hearing, the trial court entered an order denying plaintiffs' motion to amend ("postjudgment order"). In that order, the trial court determined:

> [T]he present motion to amend the [stay/dismissal] Order . . . is essentially Plaintiffs' attempt to have the court reconsider and set aside the decisions made in the [stay/dismissal] Order . . . . The issues determined in the [stay/dismissal] Order . . . are the same issues to be confronted in Plaintiffs' present motion to amend. This court's [stay/dismissal] Order dismissed all claims against Defendants and Defendant-Intervenor.

On 7 June 2017, plaintiffs filed written notices of appeal from the intervention order, the stay/dismissal order, and the postjudgment order.

II. Arguments

On appeal, plaintiffs assert the trial court erred by (1) dismissing their claims before resolving the issue of Mrs. Davis's mental incapacity; (2) denying their motion to continue or stay proceedings; (3) dismissing their claims; and (4) denying their motion to amend the stay/dismissal order. Defendants respond that plaintiffs' appeals from the intervention and stay/dismissal orders, taken respectively seventy-six and fifty days after their entries, were untimely and must be dismissed for lack of jurisdiction. Defendants also argue the trial court properly denied the motion to amend. We discuss threshold jurisdictional issues first.

III. Motion to Dismiss Appeals

[1] In their motion to dismiss plaintiffs' appeals from the stay/dismissal and intervention orders, defendants argue plaintiffs violated our Appellate Procedure Rule 3(c) by failing to file notice of appeal from those orders within thirty days of their entries, and that this thirty-day jurisdictional time limit to take appeal was not tolled by plaintiffs' motion to amend the stay/dismissal order, since that motion was not

a proper motion under our Civil Procedure Rule 59. *See* N.C. R. App. P. 3(c)(1), -(3); N.C. Gen. Stat. § 1A-1, Rule 59. Defendants argue plaintiffs' motion to amend was not a proper Rule 59 motion sufficient to toll the appeal clock because it (1) requested relief the trial court could not grant, since plaintiffs sought not to "disturb[ ] the finality of the dismissal order" and thus the trial court lacked authority to order post-dismissal discovery or an injunction in an action no longer pending; (2) impermissibly advanced duplicative arguments already addressed and requests for relief already refused by the trial court in denying their motion to continue or stay proceedings; and (3) failed to allege sufficient grounds under Rule 59(a) for relief.

In their response, plaintiffs assert their motion to amend was a proper Rule 59 motion that tolled the appeal clock, and thus their appeals were timely. Plaintiffs argue (1) although the stay/dismissal order contained a final judgment dismissing their claims, it was predicated upon the erroneous denial of their motion to continue or stay proceedings, and as to that part of the stay/dismissal order, the trial court violated Rule 17(b) by failing to inquire into Mrs. Davis's competency to proceed as a party before dismissing the case; (2) defendants should be equitably estopped from moving to dismiss their appeals based on Rizzo's subsequent fraudulent and other misconduct as alleged in plaintiffs' later filed Rule 60(b) motion, and because defendants unnecessarily delayed their filing of the motion to dismiss until after having participated in a lengthy settlement of the record on appeal; and (3) defendants' motion to dismiss "is but a diversionary tactic to prevent the trial court and now this Court from reviewing [their] case on the merits."

A. Review Standard

Generally, a party has thirty days from the entry of a final judgment to appeal, or we lack jurisdiction to review the judgment and must dismiss the appeal. *See* N.C. R. App. P. (3)(c) (requiring a party to appeal a judgment no longer than thirty days after its entry); *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., Inc.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008) ("The provisions of Rule 3 are jurisdictional, and failure to follow the rule's prerequisites mandates dismissal of an appeal." (quoting *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000)). However, a timely and proper Civil Procedure Rule 59 motion, *see* N.C. Gen. Stat. § 1A-1, Rule 59 (2017), stops the appeal clock until the trial court resolves the motion, *see* N.C. R. App. P. (3)(c)(3). But "when a party makes a motion pursuant to Rule 59 that is not a proper Rule 59 motion, the time for filing an appeal is not tolled." *N.C. All. for Transp. Reform, Inc. v. N.C. Dep't of Transp.*, 183 N.C. App. 466, 470, 645 S.E.2d

105, 108 (citation omitted), *disc. rev. denied*, 361 N.C. 569, 650 S.E.2d 812 (2007). We review *de novo* whether a postjudgment motion is a proper Civil Procedure Rule 59 motion sufficient to toll Appellate Procedure Rule 3(c)'s thirty-day jurisdictional appeal clock. *See, e.g.*, *id.* at 469, 645 S.E.2d at 107.

B. Discussion

North Carolina Civil Procedure "Rule 59(e) governs motions to alter or amend a *judgment*, and such motions are limited to the grounds listed in Rule 59(a)." *Id.* at 469, 645 S.E.2d at 108 (emphasis added) (citing N.C. Gen. Stat. § 1A-1, Rule 59(e) (2005)). "This Court has adopted a liberal interpretation of the grounds listed in Rule 59(a) when applied to Rule 59(e) motions to amend an order entered without a jury trial and has recognized that Rule 59(a) 'provides ample basis for a party to seek relief on the basis that the trial court . . . misapprehended or misapplied the applicable law.' " *Baker v. Tucker*, 239 N.C. App. 273, 274, 768 S.E.2d 874, 875 (2015) (quoting *Batlle v. Sabates*, 198 N.C. App. 407, 416, 681 S.E.2d 788, 795 (2009)). But "[w]hile failure to give the number of the rule under which a motion is made is not necessarily fatal, the grounds for the motion and the relief sought must be consistent with the Rules of Civil Procedure." *N.C. All. for Transp. Reform, Inc.*, 183 N.C. App. at 469–70, 645 S.E.2d at 108 (citing *Gallbronner v. Mason*, 101 N.C. App. 362, 366, 399 S.E.2d 139, 141 (1991)).

Rule 59(e) authorizes a party to seek the relief of "alter[ing] or amend[ing] a *judgment*." N.C. Gen. Stat. § 1A-1, Rule 59(e) (2017) (emphasis added). " 'A judgment is a determination or declaration on the merits of the rights and obligations of the parties to an action,' and an order is 'every direction of a court not included in a judgment.' " *Curry v. First Fed. Sav. & Loan Ass'n of Charlotte*, 125 N.C. App. 108, 112, 479 S.E.2d 286, 289 (1997) (quoting *Hunter v. City of Asheville*, 80 N.C. App. 325, 327, 341 S.E.2d 743, 744 (1986)). "Rule 59, by its plain terms, does not apply to interlocutory, pretrial orders." *Tetra Tech Tesoro, Inc. v. JAAAT Tech. Servs., LLC*, ___ N.C. App. ___, ___, 794 S.E.2d 535, 540 (2016); *see also id.* (holding a Rule 59(e) motion to alter or amend a preliminary injunction order did not toll the appeal clock because, in relevant part, the order was not a judgment ending the case on the merits); *Curry*, 125 N.C. App. at 112, 479 S.E.2d at 289 (holding a Rule 59(e) motion to alter or amend an order denying a motion to intervene did not toll the appeal clock because, in relevant part, the order was not a judgment).

Additionally, while a postjudgment motion requesting reconsideration "may properly be treated as a Rule 59(e) motion, it cannot be used

as a means to reargue matters already argued or to put forth arguments which were not made but could have been made." *Smith v. Johnson*, 125 N.C. App. 603, 606, 481 S.E.2d 415, 417 (citations omitted), *disc. rev. denied*, 346 N.C. 283, 487 S.E.2d 554 (1997); *see also id.* (holding a party's postjudgment motion that merely "attempt[ed] to reargue matters already decided by the trial court . . . cannot be treated as a Rule 59(e) motion").

Here, plaintiffs timely filed a "motion to amend order," identifying Rule 59(a)(1) ("Any irregularity by which any party was prevented from having a fair trial"), -(a)(3) ("Accident or surprise which ordinary prudence could not have guarded against"), and -(a)(8) ("Error in law occurring at the trial and objected to by the party making the motion"), N.C. Gen. Stat. § 1A-1, Rule 59(a)(1), -(a)(3), -(a)(8), as providing grounds to support their requested relief that the trial court "amend the order of dismissal" by granting their discovery and injunction requests "without disturbing the finality of the dismissal order." Specifically, plaintiffs sought to "amend the order of dismissal . . . for the reasons that follow[:]"

> 1. As described in the verified complaint, plaintiffs have raised substantial issues which have not been answered in this case:
>
> A. Whether [Mrs.] Davis had sufficient mental capacity to knowingly execute certain trust documents . . . ;
>
> B. Whether she had sufficient mental capacity to proceed as a party in this case without the appointment of a guardian ad litem; and[ ]
>
> C. Whether plaintiffs . . . should be reunited with Mrs. Davis, age 98, as soon as possible.
>
> 2. As shown in his affidavit filed herewith, Dr. Thomas Gualtieri was retained by plaintiffs on February 21, 2017, to perform a neuropsychiatric evaluation of [Mrs.] Davis. He is eminently qualified to do so. But, as he testifies, he cannot develop a definitive evaluation of Mrs. Davis unless he can examine her in person and view her complete medical records.
>
> 3. [Mrs.] Davis has for decades enjoyed a very close and loving relationship with her only son, Haywood Davis, Jr., deceased; her son's wife, Rebecca Davis; her grandson, Matthew Davis; and her great-grandchildren. They have prayed in their complaint that they be reunited with Mrs. Davis, 98, before she passes.

> 4. Mrs. Davis has not filed an answer or otherwise been heard from in this case about the quality of her relationship with her grandson, greatgrandchildren, and daughter-in-law. But each of the defendants, and the attorney purporting to represent Mrs. Davis, have declared that Mrs. Davis is perfectly competent to answer for herself regarding her relationship with her loved ones.
>
> 5. In their arguments before this court, defendants declared that this case would be more appropriately filed after Mrs. Davis passes. At the same time, they pressed for a hurry-up hearing to have the case dismissed before Mrs. Davis passes, which would ensure that Mrs. Davis never be examined for mental incapacity; that she never be reunited with her grandson, greatgrandchildren, and daughter-in-law; and that she never answer questions under oath about whether she still intended to treat her two children, and their respective families, equally in the disposition of her worldly assets after she passes. Counsel for Mrs. Davis filed a motion to dismiss the case without filing an answer or affidavit on her behalf, while arguing that Mrs. Davis was fully competent to answer for herself, and had decided that she never wanted to see her loved ones again, and never wanted her loved ones to see testamentary documents concerning her last wishes toward them.

Plaintiffs further alleged the "order of dismissal of this case can be amended to include the relief prayed for herein without disturbing the finality of the dismissal order." They requested the following relief:

> 1. Allow Dr. Gualtieri to perform an independent medical examination of [Mrs.] Davis personally;
>
> 2. Release the complete medical records of [Mrs.] Davis for the last ten (10) years for Dr. Gualtieri's review;
>
> 3. Allow plaintiffs to be reunited with Mrs. Davis on a regular basis before she passes;
>
> 4. For such other and further relief as the Court deems appropriate; and
>
> 5. That the Court consider the verified complaint as an affidavit in the cause, as well as Dr. Gualtieri's affidavit filed herewith, each submitted in support of this motion.

In relevant part, Dr. Gualtieri stated in his affidavit that plaintiffs hired him on 21 February 2017 to perform a neuropsychiatric evaluation on Mrs. Davis, but he "cannot develop a definitive evaluation of Mrs. Davis unless [he] can perform an independent medical examination of her in person, and review her complete medical record."

While plaintiffs' motion, under a liberal interpretation, may have alleged adequate *grounds* under Rule 59(a), as to the trial court's alleged error in failing to inquire into Mrs. Davis's competency to proceed as a party-defendant before dismissing the case, it failed to request valid Rule 59 *relief*. Rule 59 applies to final judgments, not interlocutory orders. *See, e.g.*, *Tetra Tech Tesoro, Inc.*, ___ N.C. App. at ___, 794 S.E.2d at 540. As plaintiffs concede, the stay/dismissal order contained both a final judgment, the grant of defendants' Rule 12(b)(6) motions to dismiss plaintiffs' claims, and an order denying plaintiffs' motion to continue or stay proceedings. Although the interlocutory decision to deny the motion to continue or stay proceedings presumably predicated the final judgment dismissing the case, plaintiffs' allegation in their motion to amend that "[t]he order of dismissal of this case can be amended to include the relief prayed for herein *without disturbing the finality of the dismissal order*" (emphasis added), combined with the nature of relief sought being essentially the same relief sought in their motion to continue or stay proceedings, reveals their motion to amend did not request proper Rule 59(e) relief in the form of reconsidering the final judgment dismissing their claims under Rule 12(b)(6), but of reconsidering the interlocutory decision denying their motion to continue or stay proceedings until Mrs. Davis's competency was determined.

Rule 59 provides no grounds to request relief in the form of reconsidering an interlocutory decision a party alleges is collateral to the merits of a final judgment dismissing the case, or of amending an order dismissing a case by granting previously denied discovery requests or injunctive relief. Further, as defendants argue, in light of plaintiffs not requesting the trial court reconsider its Rule 12(b)(6) dismissals, the relief requested was beyond the trial court's jurisdiction to grant. *See, e.g.*, *Johnston v. Johnston*, 218 N.C. 706, 709, 12 S.E.2d 248, 250 (1940) (holding a trial court cannot enter orders affecting parties' rights after dismissing an action).

Moreover, the trial court considered and rejected the merits of these grounds for relief when it denied plaintiffs' motion to continue or stay proceedings, and their motion to amend presented no pertinent facts not already before the trial court when it entered its stay/dismissal

order. To support their motion to continue or stay proceedings, plaintiffs similarly alleged:

> There are threshold issues in this case which must be decided before the Court can proceed to a merits adjudication of multiple motions to dismiss . . . :
>
> . . . .
>
> B. Whether Mrs. Davis had insufficient mental capacity to knowingly execute the 2016 Trust and the two deeds that conveyed valuable real properties from the 2002 Trust to the 2016 Trust, contrary to the express intent of Mrs. Davis formed when she plausibly did have sufficient mental capacity;
>
> C. Whether Mrs. Davis has insufficient mental capacity now, such that a guardian ad litem needs to be appointed to represent her interests in this case before any substantive litigation is allowed to proceed[.]
>
> . . . .
>
> 14. Plaintiffs Rebecca and Matthew have . . . employ[ed] a respected neuropsychiatrist, Dr. Thomas Gualtieri, to review Mrs. Davis's medical record to tell whether mental incapacity exists in Mrs. Davis. Once determining whether it does, Dr. Gualtieri would have to determine whether it would be necessary to proceed with an independent medical examination of Mrs. Davis to render a definitive diagnosis opinion, unless the parties could reach agreement to base this issue on the medical professionals' affidavits after examining the complete medical record. A hearing would then have to be held for the court to determine whether a guardian ad litem is required to represent Mrs. Davis' interests in this litigation.
>
> 15. . . . Dr. Gualtieri should be allowed to review the entire medical record and to conduct an independent medical examination of Mrs. Davis, if necessary in order for him to form a[ ] more informed diagnosis/opinion.

In that motion, plaintiffs also requested substantially the same relief:

> 4. All of the dispositive motions be reset for hearing after review of Mrs. Davis' medical record and examination by Dr. Gualtieri if necessary[.]

Rule 59 "cannot be used as a means to reargue matters already argued or to put forth arguments which were not made but could have been made." *Smith*, 125 N.C. App. at 606, 481 S.E.2d at 417 (citation omitted). Because plaintiffs "attempt[ed] to reargue matters already decided by the trial court . . . the motion . . . cannot be treated as a Rule 59(e) motion." *Id.*

As plaintiffs' motion to amend failed to request valid Rule 59(e) relief, and reargued issues already addressed and requested relief already denied, it failed to constitute a proper Rule 59 motion sufficient to toll the appeal clock, rendering their appeals from the intervention and stay/dismissal orders untimely. While we may exercise our discretion and treat plaintiffs' brief as a petition for *certiorari* review, allow the petition, and review the orders, *see*, *e.g.*, *Raymond v. Raymond*, ___ N.C. App. ___, ___, 811 S.E.2d 168, 173 (2018) (citations omitted), after considering the merits of their arguments, we decline to do so. Accordingly, we dismiss plaintiffs' appeals from the stay/dismissal and intervention orders. However, because plaintiffs timely appealed the postjudgment order, that order is properly before us.

IV. Order Denying Postjudgment Relief

[2] Plaintiffs assert the trial court abused its discretion by denying their motion to amend the stay/dismissal order. Their motion to amend identified our Civil Procedure Rule 59(a)(1), -(a)(3), and -(a)(8), as well as Rule 60(b)(1) and -(b)(6).

"As with Rule 59 motions, the standard of review of a trial court's denial of a Rule 60(b) motion is abuse of discretion." *Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006) (citing *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975)). Having already concluded Rule 59 provided no grounds for the trial court to grant plaintiffs' requested relief without "disturbing the finality of the dismissal order," the trial court did not abuse its discretion in denying their motion under Rule 59 on this basis. Further, Rule 60(b) authorizes a trial court to "relieve a party . . . from a *final* judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment." N.C. Gen. Stat. § 1A-1, Rule 60(b)(1), -(b)(6) (2017) (emphasis added). Aside from plaintiffs failing to sufficiently argue grounds for Rule 60(b) relief under the subdivisions identified, either in their motion to amend or on appeal, plaintiffs failed to request proper Rule 60(b) relief in setting aside any final judgment, as their motion sought not to "disturb[ ] the finality of the dismissal order." Nonetheless, we elect to address plaintiffs' arguments.

In their brief, plaintiffs contend, without supportive legal authority or further argument, the trial court erred and abused its discretion in denying their motion to amend by (1) failing to hold a hearing before entering an order denying the motion, (2) concluding the arguments advanced in their motion to amend duplicated arguments already raised, and (3) dismissing their claims without determining Mrs. Davis's competency to proceed as a party in the case. Plaintiffs also attempt in their brief to "refer[ ] to and incorporate[ ] . . . by reference" "[t]he arguments contained in [their] response to defendants' motion to dismiss this appeal" "for further support of [their] contention that the trial court's denial of plaintiffs' motion to amend was an abuse of discretion." Plaintiffs' failures to adequately brief these issues constitutes waiver of these arguments. *See* N.C. R. App. P. 28(b)(6).

However, we note a trial court need not hold a hearing before denying a postjudgment motion for relief, *see*, *e.g.*, *Ollo v. Mills*, 136 N.C. App. 618, 625, 525 S.E.2d 213, 217 (2000) ("Our review of the trial court's decision to enter an order on Ms. Ollo's motion under Rules 59 and 60 without notice or a hearing is limited to whether the trial judge abused his discretion."), and we have already concluded plaintiffs' motion to amend raised the same grounds for relief as their motion to continue or stay proceedings. Further, even if plaintiffs were permitted to incorporate into their brief arguments from their response to defendants' motion to dismiss, a thorough review of that response reveals the only potentially relevant argument is that the trial court violated North Carolina Civil Procedure Rule 17 by dismissing their claims without first inquiring into Mrs. Davis's competency to proceed as a party to the case.

Under Rule 17, "[a] trial judge has a duty to properly inquire into the competency of a litigant in a civil trial or proceeding when circumstances are brought to the judge's attention, which raise a *substantial question* as to whether the litigant is *non compos mentis*." *In re J.A.A.*, 175 N.C. App. 66, 72, 623 S.E.2d 45, 49 (2005) (emphasis added) (citing *Rutledge v. Rutledge*, 10 N.C. App. 427, 432, 179 S.E.2d 163, 166 (1971)). "Whether the circumstances . . . are sufficient to raise a substantial question as to the party's competency is a matter to be initially determined in the sound discretion of the trial judge." *Id.* (quoting *Rutledge*, 10 N.C. App. at 432, 179 S.E.2d at 166).

Here, plaintiffs' only showing that Mrs. Davis was mentally incompetent and needed a guardian *ad litem* appointed on her behalf was limited to unsubstantiated allegations in their complaint and arguments before the trial court that Mrs. Davis's mental health has been deteriorating since 2010. Although plaintiffs attached to their motion to continue

or stay proceedings a one-and-a-half-page, type-written summary of Mrs. Davis's alleged medical records from 2008 to 2016, neither have they identified, nor has our review of the record revealed, any legitimate record from any medical provider. In light of the affidavits from Mrs. Davis and her treating physician of seven years, we find no abuse of discretion in the trial court determining that plaintiffs failed to raise a substantial question as to Mrs. Davis's competency.

Because plaintiffs failed to show the trial court abused its discretion in denying their motion to amend under Rules 59 or 60, we affirm the postjudgment order.

V. Conclusion

Because plaintiffs' appeals from the intervention and stay/dismissal orders were untimely and their motion to amend the stay/dismissal order did not constitute a proper Civil Procedure Rule 59 motion sufficient to toll Appellate Procedure Rule 3(c)'s thirty-day jurisdictional appeal clock, we allow defendants' motion to dismiss plaintiffs' appeals from those orders. Because plaintiffs have failed to demonstrate the trial court abused its discretion in denying their motion to amend under Civil Procedure Rules 59 or 60, we affirm the postjudgment order.

DISMISSED IN PART; AFFIRMED IN PART.

Judges TYSON and ZACHARY concur.

IN RE W.H.

[261 N.C. App. 24 (2018)]

IN THE MATTER OF W.H., J.H., J.L.H., & J.E.H.

No. COA18-8

Filed 21 August 2018

1. Evidence—hearsay—exceptions—residual—notice

Where the trial court admitted under the hearsay rule's residual exception out-of-court statements by defendant's daughters regarding his sexual abuse of them, the State provided sufficient notice of the statements—which had already been provided to defendant months earlier—by sending written notice between 1 week and 7 months before the statements were introduced at the various court proceedings on the matter.

2. Evidence—hearsay—exceptions—residual—trustworthiness

Where the trial court admitted under the hearsay rule's residual exception out-of-court statements by defendant's daughters regarding his sexual abuse of them, the trial court did not abuse its discretion in determining the statements were trustworthy. Even though the trial court's findings failed to mention that the daughters recanted their allegations, this failure was not fatal, and the trial court made numerous findings in determining the statements were trustworthy.

3. Evidence—hearsay—exceptions—residual—unavailability

Where the trial court admitted under the hearsay rule's residual exception out-of-court statements by defendant's daughters regarding his sexual abuse of them, the trial court did not err by determining that the daughters were unavailable to testify on the grounds that testifying would traumatize them, would cause them confusion, and would create a risk that they would be untruthful out of guilt and fear. These findings were not inconsistent with the finding that their out-of-court statements were trustworthy.

4. Child Visitation—ceased visitation for father—neglected sons—sexual abuse of daughters

The trial court did not abuse its discretion by ceasing visitation between defendant father and his sons where defendant had sexually abused his daughters, his sons were adjudicated neglected, and the trial court concluded that visitation with any of the children would be against their best interests, health, and safety.

IN RE W.H.

[261 N.C. App. 24 (2018)]

Appeal by Respondent from orders entered 17 March 2017 and 2 May 2017 by Judge P. Gwynett Hilburn in Pitt County District Court. Heard in the Court of Appeals 6 June 2018.

The Graham.Nuckolls.Conner. Law Firm, PLLC, by Timothy E. Heinle, for Appellee Department of Social Services.

GAL Appellate Counsel, by Matthew D. Wunsche, for guardian ad litem.

Mary McCullers Reece for Respondent-Appellant.

DILLON, Judge.

Jonathan Harris ("Father") appeals from the trial court's judgment finding each of his four children neglected, and finding his two daughters to be abused. Father argues the trial court erred and abused its discretion by allowing his daughters' many out-of-court statements into evidence under the residual exception to the hearsay rule. Father also argues the trial court erred and abused its discretion by ceasing visitation between Father and his sons. We affirm.

I. Background

This case arises from a long timeline of reported abuse. The evidence at the adjudication hearing tended to show as follows:

Father and his wife ("Mother") married in July 2002 and separated in March 2011. Four children were born from the marriage, W.H. ("Weston"), J.H. ("Jeremy"), J.L.H. ("Julia"), and J.E.H. ("Jasmine").[1]

In December 2011, Mother reported to the Department of Social Services ("DSS") that Jasmine had been sexually abused by Father in his home. Jasmine told Mother that Father put his penis in her mouth on two occasions. The next day Jasmine was interviewed by a DSS social worker in Mother's home. Jasmine repeated the statement to the social worker.

Early the next month, on 4 January 2012, Jasmine completed a forensic evaluation at the TEDI Bear Children's Advocacy Center in Greenville. Jasmine did not disclose sexual abuse, and the medical exam uncovered no physical evidence of any type of sexual contact. The TEDI

1. Pseudonyms are used to protect the identity of the juveniles and for ease of reading. N.C. R. App. P. 3.1(b).

Bear report provided that "recantation is not uncommon in cases of child sexual abuse" and concluded that Jasmine's allegations merited further investigations.

A few weeks later, on 20 January 2012, the DSS social worker revisited Mother's home and asked Jasmine if there was anything else Jasmine wanted to tell her. Jasmine drew pictures suggesting a child having oral contact with a man's genitals. Jasmine told the social worker that she was the child in the pictures and Father was the man.

About three and a half years later, in August 2015, the 2012 allegations resurfaced. Julia, Father's younger daughter, told Jasmine that Father had made inappropriate sexual contact with her. Julia then told Mother, and DSS reopened its investigation. Another social worker interviewed both Jasmine and Julia. Both daughters described inappropriate sexual contact and touching of their private parts by Father. On 31 August 2015, Julia described the inappropriate sexual contact to the TEDI Bear Clinic.

In January 2016, DSS filed petitions alleging that Father's minor children, Weston, Jeremy, Jasmine, and Julia, were neglected, and that Jasmine and Julia were abused. In early 2016, the Pitt County Sheriff's Department interviewed Jasmine and Julia separately. Both girls stated Father had done something they "didn't like," but did not provide further details.

At a preliminary hearing, the trial court determined that the girls were unavailable to testify. The trial court found that the girls were motivated to speak the truth while making prior out-of-court statements, that their recent out-of-court statements to the interviewers at the TEDI Bear Clinic, DSS social workers, and police detectives all possessed circumstantial guarantees of trustworthiness, and admitted the statements pursuant to the residual exception to the hearsay rule. The trial court ultimately adjudicated Jasmine and Julia sexually and emotionally abused, and adjudicated all four children neglected.

Father timely appeals.

II. Analysis

Father makes a number of arguments on appeal, which we address in turn.

A. Residual Exception to Hearsay

Father argues that the trial court erred in allowing his daughters' many out-of-court statements regarding his alleged sexual abuse of

them into evidence. Specifically, Father contends that the State failed to provide sufficient notice of the particulars of the statements, as required by Rule 803(24) of the North Carolina Rules of Evidence. Father also contends the trial court failed to consider other factors approved by our Supreme Court in concluding that the statements possessed circumstantial guarantees of trustworthiness, including the daughters' recantation, the factors affecting the daughters' motivation to tell the truth, and the reason for the daughters' unavailability to testify. We disagree.

The admission of evidence pursuant to the residual exception to hearsay is reviewed for an abuse of discretion, "and may be disturbed on appeal only where an abuse of such discretion is clearly shown." *Brissett v. Mount Vernon Undus. Loan Ass'n.*, 233 N.C. App. 241, 246, 756 S.E.2d 798, 803 (2014). The appellant must show that "[he or she] was prejudiced and a different result would have likely ensued had the error not occurred." *Id.*

When employing Rule 803(24), our Supreme Court has interpreted the residual exception to require the trial court to determine whether (1) proper notice has been given; (2) the hearsay statement is not specifically covered elsewhere; (3) the statement possesses circumstantial guarantees of trustworthiness; (4) the statement is material; (5) the statement is more probative than any other evidence which the proponent can procure through reasonable efforts; and (6) the interest of justice will be best served by admission. *See State v. Smith*, 315 N.C. 76, 92-96, 337 S.E.2d 833, 844-46 (1985); N.C. R. Civ. P. § 8C, Rule 803(24).

[1] Father challenges the trial court's decision on several grounds. First, Father argues that the trial court erred in determining that DSS provided proper notice of its intention to offer the daughters' statements and their particulars sufficiently in advance to provide Father with a fair opportunity to prepare for the hearing. Our Supreme Court has instructed that the notice requirement is flexible and that notice is sufficient so long as it gives the opposing party "fair opportunity to meet the proffered evidence." *State v. Triplett*, 316 N.C. 1, 12-13, 340 S.E.2d 736, 743 (1986).

In this case, DSS sent written notice to Father of its intent to use the out-of-court statements made by his daughters to TEDI Bear, the Pitt County Sherriff's Office, North Hampton County DSS, and Pitt County DSS. DSS sent this written notice between one week and seven months before the statements were introduced at the varying hearings and trial that followed. And these statements had been previously provided to Father many months before DSS sent its written notice. We have reviewed the case law on point and the record in this case and hold

that the trial court did not err in determining that the State provided sufficient notice to afford Father a fair opportunity to prepare, in compliance with Rule 803(24).

[2] Father next argues the trial court erred in determining that his daughters' out-of-court statements were trustworthy because the trial court failed to consider that his daughters had recanted their accusations during their 2012 TEDI Bear interviews. Our Supreme Court has often used the following factors in determining a statement's trustworthiness: (1) the declarant's personal knowledge of the underlying event; (2) the declarant's motivation to speak the truth or otherwise; (3) whether the declarant ever recanted the testimony; and (4) the practical availability of the declarant at trial for meaningful cross-examination. *State v. Valentine*, 357 N.C. 512, 518, 591 S.E.2d 846, 852-53 (2003); *Smith*, 315 N.C. at 93-94, 337 S.E.2d at 845. We note that any recantation of testimony is a factor. However, our Supreme Court has also instructed that "[n]one of these [four] factors, alone or in combination, may conclusively establish or discount the statement's 'circumstantial guarantees of trustworthiness.' " *Id.*

Here, the trial court made a number of findings regarding the numerous out-of-court statements made by Jasmine and Julia concerning their Father's abuse. It is true that the trial court made no mention of the daughters' 2012 TEDI Bear interview. Our Supreme Court, though, has held that the failure of a trial court to make findings in this regard is not fatal. *Valentine*, 357 N.C. at 519, 591 S.E.2d at 853. We have reviewed the trial court's findings and the record, and we conclude that the trial court did not abuse its discretion in determining that the out-of-court statements were trustworthy.

[3] Finally, Father argues that the trial court erred in determining that his daughters were unavailable to testify at trial. The trial court made this determination based on its findings that the out-of-court statements were trustworthy, that testifying would traumatize the daughters, that testifying would cause them confusion, and that there would be a risk that they would not be truthful out of guilt and fear. Specifically, Father contends that it was improper and inconsistent for the trial court to find that all of the out-of-court statements possessed sufficient circumstantial guarantees of trustworthiness, but that the daughters' confusion and anxiety might compromise the truthfulness of their testimony in court. Father relies on *State v. Stutts*, in which we held that "finding a witness unavailable to testify because of an inability to tell truth from fantasy prevents that witness' out-of-court statements from possessing

guarantees of trustworthiness . . . under the residual exception[.]" *State v. Stutts*, 105 N.C. App. 557, 563, 414 S.E.2d 61, 64-65 (1992).

However, in *Stutts*, the trial court determined that a juvenile was unavailable because she had an inability to discern truth from falsehood. On appeal, our Court held that the trial court's reasoning also led to a conclusion that *any* statement made by the juvenile – even her out-of-court statements – were untrustworthy, since she could not tell truth from fantasy. *Id.* In the present case, the trial court did not reason that the daughters could not tell truth from fantasy, but rather that they would more likely be intentionally untruthful out of guilt and fear. *See State v. Holden*, 106 N.C. App. 244, 251-52, 416 S.E.2d 415, 420 (1992) (distinguishing *Stutts*, holding that trial court did not err based on finding that witness was unavailable due to "fear and trepidation").

B. Suspension of Visitation Rights

[4] Father argues it was error for the trial court to consider the girls' best interest in lieu of the boys' best interest in determining whether Father could continue to visit with the boys. We disagree.

"This Court reviews the trial court's dispositional orders of visitation for an abuse of discretion." *In re C.M.*, 183 N.C. App. 207, 215, 644 S.E.2d 588, 595 (2007); N.C. Gen. Stat. §§ 7B-507 (2015). Section 7B-507 requires a child to be placed in the custody of DSS if returning the child to his or her home would be against the child's health and safety. N.C. Gen. Stat. §§ 7B-507.

The trial court here found that, because Father had been found to have sexually abused his daughters and his sons were adjudicated to have been neglected, further visitation with any of the children was against the children's best interests, health, and safety. Father's conduct toward his daughters directly influenced the trial court's determinations, but only insofar as it suggested that further contact could put the sons' safety at risk. We have reviewed the trial court's order and hold the trial court did not abuse its discretion in ceasing further visitation with Father.

AFFIRMED.

Judges DAVIS and INMAN concur.

SHELL v. SHELL

[261 N.C. App. 30 (2018)]

DAVID W. SHELL AND DONNA SHELL, PLAINTIFFS
v.
DAVID DWAYNE SHELL AND NICOLE RENEE GREEN, DEFENDANTS

No. COA17-990

Filed 21 August 2018

1. Child Custody and Support—modification of prior order—substantial change of circumstances—sobriety

A mother's maintenance of sobriety for over four years and the resulting changes in her life were a substantial change in circumstances for purposes of modifying a prior custody order. Her ability to care for the children had improved dramatically.

2. Child Custody and Support—modification of prior order—substantial change of circumstances—mother's remarriage

A mother's remarriage constituted a change in circumstances in an action to modify a child custody order where the father contended that the relationship between the children and their stepfather had not changed. The trial court's finding of the stepfather's development of a strong relationship with the children and his positive involvement in the children's lives was a change of circumstances affecting the children's welfare.

3. Child Custody and Support—modification of prior order—substantial change of circumstances—communication between parents

Changes in communication between the parents constituted a substantial change in circumstances in an action to change a prior custody order. Although the father argued that no substantial change in communications had occurred because the parties had had difficulty with communication before the prior order, the trial court noted that the father had become less cooperative and less willing to communicate.

4. Child Custody and Support—modification of prior order—substantial change in circumstances—father's capabilities

In a proceeding to modify a prior child custody order, there was a change in circumstances concerning the father's inability to read and to help the children with their schoolwork. Although the father argued that there had been no change since the prior order, the father's limited capabilities had more impact on the children as they advanced in school.

5. Child Custody and Support—modification of prior order —substantial change of circumstances—best interests of children

The trial court did not abuse its discretion by determining that it was in the best interests of the children to change custody so that they primarily resided with their mother. Previously, primary custody had been with the father, with the children residing with the paternal grandparents, but the trial court found that primary residence with their mother was in their best interests due the mother's maintenance of sobriety, her ability to maintain a stable job and provide a proper home, the children's close relationship to their stepfather, the father's increasingly autocratic control seeking to shut the mother out of the children's lives, and the father's need to rely on his parents to care for the children.

Appeal by plaintiffs and defendant Shell from order entered 6 February 2017 by Judge Hal G. Harrison in District Court, Watauga County. Heard in the Court of Appeals 8 February 2018.

Anné C. Wright, for plaintiffs-appellants.

Epperson Law, PLLC, by James L. Epperson, for defendant-appellee Nicole Renee Green.

STROUD, Judge.

Plaintiffs and defendant Shell appeal a custody modification order changing primary physical custody from defendant Shell to defendant Green. Because the trial court's findings of fact support its conclusion there had been a substantial change in circumstances affecting the best interest of the children and that modification would be in their best interest, we affirm.

I. Background

This appeal arises from the modification of a 2012 custody order. Plaintiffs, David and Donna Shell, are the paternal grandparents of the children, Sam and Kim.[1] Defendant David Shell is the son of plaintiffs and father of Sam and Kim. Defendant Nicole Green is the children's mother and has married since the prior order and is now Nicole McKiernan. We will identify all parties by their relation to Sam and Kim. Therefore,

1. A pseudonym is used to protect the privacy of the minors involved.

plaintiffs will be referred to as the "Grandparents," defendant Shell as "Father" and defendant Green as "Mother." Although both parents are "defendants," the interests of defendant Father are aligned with plaintiff Grandparents and are opposed to the interests of defendant Mother.

The prior custody order was entered in May 2012. Father was granted sole legal and physical custody of the children and Mother had visitation rights. At the time of the prior order, Father and the children resided with Grandparents; they still lived with Grandparents at the time of the hearing on the motion to modify custody. Father "has limited education and intelligence[,]" struggles with literacy, and "relies heavily on his parents." In 2011, Mother had admitted to Father she was using marijuana, cocaine, and alcohol to excess. She was also "spending time" with a man who later went to prison for selling methamphetamine. She had moved four times in the ten months prior to the hearing because she could not afford rent or utilities. She also could not keep a job, and she was fired or quit jobs several times. At the time of the 2012 hearing, the children were ages five and two. Mother's home was 45 minutes away from the older child's school. In August 2011, Grandmother went to her home and found it was strewn with trash and empty alcohol containers. One child had cut her foot on glass on the floor, and Grandmother took her away from Mother's home. In September 2011, Mother had posted nude photos on the internet, was drinking heavily, and was not making good decisions. Father was living with his parents in a stable home.

On 3 June 2016, Mother moved to modify custody alleging that since the prior custody order there had been a substantial change of circumstances affecting the welfare of the children because she had remained sober for several years, maintained a job for over two years, and gotten remarried. She also alleged that Father had become more difficult to deal with regarding visitation. He refused to send the children's homework so the children could complete it during visits with Mother, and he denied Mother information about the children's school activities and would not allow her to participate.

On 17 and 30 January 2017, the trial court held a hearing on the motion to modify custody. The trial court entered an order modifying custody on 6 February 2017, which determined there had been a substantial change of circumstances affecting the welfare of the children and modified custody, granting Father and Mother joint legal custody, with Mother receiving primary physical custody. Father and Grandparents appeal.[2]

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2. Grandparents have filed a petition for writ of certiorari with this Court because their notice of appeal was not timely; however, Father provided timely notice of appeal,

II. Modification of Custody

Father first contends that "the trial court erred in finding that there were substantial changed circumstances since the entry of the last custodial order in May 2012 when little, if anything, had changed [and] any changes that did occur did not affect the welfare of the children" and even "assuming *arguendo* that there was a substantial change in circumstance materially affecting the children, the trial court nevertheless abused its discretion by 'flipping' the previous custody arrangement and disrupting the children's stability and routine." (Original in all caps).

A. Standard of Review

> It is well established in this jurisdiction that a trial court may order a modification of an existing child custody order between two natural parents if the party moving for modification shows that a substantial change of circumstances affecting the welfare of the child warrants a change in custody. The party seeking to modify a custody order need not allege that the change in circumstances had an adverse effect on the child. While allegations concerning adversity are acceptable factors for the trial court to consider and will support modification, a showing of a change in circumstances that is, or is likely to be, beneficial to the child may also warrant a change in custody.
>
> As in most child custody proceedings, a trial court's principal objective is to measure whether a change in custody will serve to promote the child's best interests. Therefore, if the trial court does indeed determine that a substantial change in circumstances affects the welfare of the child, it may only modify the existing custody order if it further concludes that a change in custody is in the child's best interests.
>
> The trial court's examination of whether to modify an existing child custody order is twofold. The trial court must determine whether there was a change in circumstances and then must examine whether such a change affected the minor child. If the trial court concludes

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and he and Grandparents have filed one joint brief. Because we will necessarily consider Grandparent's arguments based upon Father's timely appeal, we need not grant their petition for writ of certiorari and thus dismiss it.

either that a substantial change has not occurred or that a substantial change did occur but that it did not affect the minor child's welfare, the court's examination ends, and no modification can be ordered. If, however, the trial court determines that there has been a substantial change in circumstances and that the change affected the welfare of the child, the court must then examine whether a change in custody is in the child's best interests. If the trial court concludes that modification is in the child's best interests, only then may the court order a modification of the original custody order.

When reviewing a trial court's decision to grant or deny a motion for the modification of an existing child custody order, the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

Our trial courts are vested with broad discretion in child custody matters. This discretion is based upon the trial courts' opportunity to see the parties; to hear the witnesses; and to detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges. Accordingly, should we conclude that there is substantial evidence in the record to support the trial court's findings of fact, such findings are conclusive on appeal, even if record evidence might sustain findings to the contrary.

In addition to evaluating whether a trial court's findings of fact are supported by substantial evidence, this Court must determine if the trial court's factual findings support its conclusions of law. With regard to the trial court's conclusions of law, our case law indicates that the trial court must determine whether there has been a substantial change in circumstances and whether that change affected the minor child. Upon concluding that such a change affects the child's welfare, the trial court must then decide whether a modification of custody was in the child's best interests. If we determine that the trial court has properly concluded that the facts show that a substantial change of circumstances has affected the welfare of the minor child and that modification was in the child's

> best interests, we will defer to the trial court's judgment and not disturb its decision to modify an existing custody agreement.

Shipman v. Shipman, 357 N.C. 471, 473-75, 586 S.E.2d 250, 253-54 (2003) (citations, quotation marks, and brackets omitted).

B. Substantial Change in Circumstances

Father does not challenge the findings of fact as unsupported by the evidence but contends that the facts are not enough to establish a substantial change in circumstances affecting the welfare of the children since entry of the 2012 order. His argument addresses several of the circumstances addressed by both the 2012 order and the order on appeal. We address each in turn.

1. Sobriety

[1] In the 2012 order, as noted above, Mother's living circumstances were very unstable and she was unable to care for the children properly. In the order on appeal, the trial court found that when the 2012 order was entered, Mother had been sober for about eight months, but she was still "struggling with her sobriety" and that she was selfish. As of the 2017 hearing, Mother had been sober from drugs and alcohol for about four years. Father argues Mother's sobriety is not a change of circumstances because at both times, she was sober. We disagree.

Changes in circumstances may be either negative or positive. *See, e.g.*, *Pulliam v. Smith*, 348 N.C. 616, 619, 501 S.E.2d 898, 899 (1998) ("[C]ourts must consider and weigh all evidence of changed circumstances which affect or will affect the best interests of the child, both changed circumstances which will have salutary effects upon the child and those which will have adverse effects upon the child. In appropriate cases, either may support a modification of custody on the ground of a change in circumstances."). Here, the trial court's findings show that Mother had made positive changes that affect the children. The trial court's findings in the 2012 order detailed the detrimental effects Mother's drug and alcohol abuse was having on the children, resulting in her inability to keep a job or residence and her poor judgment. In contrast, the order on appeal details how these things had improved dramatically: Mother had maintained a stable job and home and had become a loving and caring parent. There is no doubt that a parent's alcohol and drug abuse normally has negative effects on children, as Mother's did prior to the 2012 order. Mother's maintainance of her sobriety for over four years and the resulting changes in her life show that her ability to

care for the children had improved dramatically. *See generally Dreyer v. Smith*, 163 N.C. App. 155, 159, 592 S.E.2d 594, 596 (2004) ("Here, however, the trial court made ample findings of fact describing the negative effect of Ms. Smith's remarriage on the children. We hold that these findings -- setting forth the children's exposure to alcohol abuse, violent behavior, illegal drugs, and a risk of physical harm -- support the trial court's conclusion that there has been a substantial change of circumstances affecting the welfare of the children.").

Father also contends that even if Mother's sobriety is a change of circumstances, it has no effect on the children. This argument is difficult to understand, since Father contended -- quite correctly -- in 2012 that Mother's substance abuse was still having detrimental effects on the children, even after she had been sober for a few months. Her life was still unstable, even if she was not actively using drugs or alcohol. Considering the other findings in the order regarding the positive changes in Mother's life which have accompanied her sobriety, this argument is entirely without merit. *See id.* The trial court's order includes many findings detailing these effects -- Mother's involvement with the children, her ability to provide a home and support them, and her becoming a caring parent instead of a selfish and unreliable one.

2. Remarriage

[2] Father next contends that Mother's remarriage was not a substantial change of circumstances, as the relationship between the children and their now-stepfather did not change. "[R]emarriage, in and of itself, is not a sufficient change of circumstance affecting the welfare of the child to justify modification of the child custody order without a finding of fact indicating the effect of the remarriage on the child." *Evans v. Evans*, 138 N.C. App. 135, 140, 530 S.E.2d 576, 579 (2000). But the trial court found this relationship had become stronger and was beneficial to the children: "*Since the entry of the prior Order* Thomas McKiernan has developed a strong bond with the children and is very involved in their lives during periods of visitation provided to" Mother. (Emphasis added.) The trial court's finding of the stepfather's development of a strong relationship with the children and his positive involvement in the children's lives is a change of circumstances that affects the children's welfare.

3. Difficult Communication

[3] Father next argues that the parties had difficulty with communication prior to entry of the 2012 order so no substantial change of circumstances has occurred, and even if their communications had changed,

this did not affect the children nor was there any evidence it did. We addressed a similar argument regarding the parents' difficulties in communication in *Laprade v. Barry*:

> It is beyond obvious that a parent's unwillingness or inability to communicate in a reasonable manner with the other parent regarding their child's needs may adversely affect a child, and the trial court's findings abundantly demonstrate these communication problems *and* the child's resulting anxiety from her father's actions. While father is correct that this case overall demonstrates a woeful refusal or inability of both parties to communicate with one another as reasonable adults on many occasions, we can find no reason to question the trial court's finding that these communication problems are *presently* having a negative impact on Reagan's welfare that constitutes a change of circumstances. In fact, it is foreseeable the communication problems are likely to affect Reagan more and more as she becomes older and is engaged in more activities which require parental cooperation and as she is more aware of the conflict between her parents. Therefore, we conclude that the binding findings of fact support the conclusion that there was a substantial change of circumstances justifying modification of custody.

Laprade v. Barry, ___ N.C. App. ___, ___, 800 S.E.2d 112, 117 (2017) (citation omitted).

Here, the trial court specifically noted the changes in communication and cooperation since the 2012 order. Although the parties had always had trouble communicating, Father had become even less willing to cooperate with Mother. Father had refused to allow Mother to get information regarding the children's education, including their report cards; he refused to allow Mother to attend school activities and parent teacher conferences; he failed to send the children's homework with them when they visited Mother; and refused to allow Mother to have the children's medical information. At the time of the prior order, the older child was just beginning school and the younger was only two. At the time the trial court entered the order on appeal modifying custody, the children were ages ten and seven, and both were in school and extracurricular activities. Just as in *Laprade*, "[i]t is beyond obvious" how Father's unwillingness to communicate with Mother regarding the children's school and medical needs would have a negative effect on the children that becomes more substantial as the children grow older. *Id.*

at __, 800 S.E.2d at 117. In addition, the trial court's order includes findings about how Father's refusal to share information, particularly about school, is detrimental the children.

4. Father's Capabilities

[4] Father also contends that he has always needed assistance from his parents and there has not been a change in his capabilities since entry of the 2012 order. The trial court also addressed the detrimental effects of Father's inability to read and to assist the children with school work. Despite his lack of ability to help the children, he still he refused to allow Mother to help by sending homework with them and allowing Mother to be involved in parent teacher conferences. As just noted in *Laprade*, above, as children become older, they have more involvement with school activities, parent-teacher meetings become more detailed, and homework becomes more complex. As the children have advanced in school, Father's limited capabilities have had more of an impact on the children's lives and this will likely continue as the children get older. *See id.* at __, 800 S.E.2d at 117. Father's argument fails to take into account the fact that the children themselves are always changing and their needs change, although his abilities have remained the same. His inability to read and to assist the children with schoolwork affects the children more as they progress through their own education and must do more challenging work.

5. Conclusion

The trial court's findings of fact regarding Mother's years of sobriety, her remarriage along with the stepfather's positive relationship with the children, Father's and Mother's worsening communications, and Father's limited capabilities, while the children's needs are becoming more complex, support its conclusion there have been substantial changes of circumstances since the prior order that affect the welfare of the minor children. *See generally Shipman*, 357 N.C. at 473-75, 586 S.E.2d at 253-54.

C. Best Interests

[5] *Last, Father contends that even assuming* there was a substantial change of circumstances affecting the welfare of the children, it was not in their best interest to change custody as the "best interests were that they remain with their Father in the paternal Grandparents' home." (Original in all caps.) Again, "a trial court's principal objective is to measure whether a change in custody will serve to promote the child's best interests." *Id.* at 474, 586 S.E.2d at 253.

> Once the trial court makes the threshold determination that a substantial change has occurred, the court then must consider whether a change in custody would be in the best interests of the child. As long as there is competent evidence to support the trial court's findings, its determination as to the child's best interests cannot be upset absent a manifest abuse of discretion.

Metz v. Metz, 138 N.C. App. 538, 540-41, 530 S.E.2d 79, 81 (2000) (citations omitted).

Here, the trial court found that due to Mother's maintenance of her sobriety, ability to maintain a stable job and provide a proper home, the children's close relationship to their stepfather, Father's increasingly "autocratic" control seeking to shut Mother out of the children's lives, and Father's continued need to rely on his parents to care for his children, it was in the best interests of the children to primarily reside with their Mother. We discern no abuse of discretion with this determination.

III. Conclusion

Because the trial court's findings of fact support its conclusion there was a substantial change of circumstances affecting the welfare of the minor children since the prior order and because the trial court did not abuse its discretion in concluding it was in the best interests of the children to primarily reside with their Mother, we affirm.

AFFIRMED.

Judges DILLON and INMAN concur.

EDWARD R. SMITH AND ARCHIE N. SMITH, BY AND THROUGH HIS GUARDIAN AD LITEM, JENNIE L. SMITH, PLAINTIFFS

v.

USAA CASUALTY INSURANCE COMPANY, ERIE INSURANCE COMPANY, ZURICH AMERICAN INSURANCE COMPANY, UNIVERSAL UNDERWRITERS INSURANCE COMPANY, VALLEY AUTO WORLD, INC. AND THE ESTATE OF JOHN PINTO, JR., DEFENDANTS

No. COA17-1080

Filed 21 August 2018

1. Appeal and Error—interlocutory—substantial right affected—duty to defend

An appeal from a summary judgment in an automobile accident case affected a substantial right and was properly before the Court of Appeals where it implicated an insurance company's duty to defend.

2. Declaratory Judgments—standing—automobile accident—third party victim

Third party automobile accident victims did not have standing to seek a declaratory judgment as to the coverage of insurance policies in which they were not named insureds. Although this was a conditionally delivered vehicle purchased the day of the accident, N.C.G.S. § 20-75.1 did not address the rights of third-party accident victims.

3. Declaratory Judgments—standing—insurance company—automobile accident

An insurance company had standing to seek a declaratory judgment under N.C.G.S. § 1-257 as to coverage obligations arising from an automobile accident and an underlying tort action.

4. Parties—necessary—declaratory judgment determining insurance obligation

A summary judgment in an action to determine insurance coverage after an automobile accident was vacated and remanded for the joinder of necessary parties. The accident occurred the night after the used vehicle was purchased. While the car dealership and a credit leasing company acted as if the dealer was the owner of the vehicle, ownership was still with the latter entity when the accident occurred and neither it nor any of its insurers were made parties to the action.

Appeal by defendant Universal Underwriters Insurance Company from order entered 13 April 2017 by Judge Richard T. Brown in Hoke County Superior Court. Heard in the Court of Appeals 5 April 2018.

Van Camp, Meacham & Newman, PLLC, by Thomas M. Van Camp, for plaintiffs-appellees.

Martineau King PLLC, by Elizabeth A. Martineau and Lee M. Thomas, for defendant-appellee Erie Insurance Company.

Gallivan, White, & Boyd, P.A., by James M. Dedman, IV, for defendant-appellant Universal Underwriters Insurance Company.

DAVIS, Judge.

On 30 April 2016, John Pinto, Jr. sought to purchase a vehicle from Valley Auto World ("VAW"), a car dealership in Fayetteville, North Carolina. Although the sales documents listed VAW as the seller of the vehicle, the actual owner was a separate entity, VW Credit Leasing, Ltd. ("VW Credit"). Later that evening, Pinto was killed in a collision while driving the vehicle. The occupants of the other car involved in the wreck were seriously injured and filed a negligence lawsuit against Pinto's estate along with a request for a declaratory judgment as to the liability insurance obligations of several insurers in connection with the accident. Following the filing of motions for summary judgment by the parties, the trial court entered an order determining that VAW's insurer provided primary liability insurance coverage to Pinto's estate and that excess coverage was provided by Pinto's personal insurer. Because we conclude that the absence of necessary parties in this lawsuit precluded the entry of a declaratory judgment, we vacate the trial court's order and remand for further proceedings.

Factual and Procedural Background

On 23 April 2016, Cheryl Copes returned a 2013 Volkswagen Beetle (the "Beetle") to VAW that she had previously leased from VW Credit.[1] At that time, Copes still owed $14,836 on her lease. Shortly after Copes completed her trade-in, the Beetle was placed on the VAW lot for resale. At that time, VAW had not yet paid off the remainder of the amount owed

1. The record contains testimony from a VAW employee stating that a "dealer agreement" existed between VAW and VW Credit on 30 April 2016. However, the record does not further explain the precise nature of their relationship.

to VW Credit under Copes' lease. As a result, VW Credit remained the title owner of the vehicle.

On the morning of Saturday, 30 April 2016, Pinto went to VAW for the purpose of trading in his 2004 Saturn and purchasing another vehicle. He ultimately decided to purchase the Beetle that had been traded in by Copes. Despite the fact that VAW did not actually own the vehicle, VAW sales representatives and Pinto nevertheless agreed upon a purchase price of $14,500 for the Beetle with a trade-in value of $2,000 for the Saturn. Because Pinto did not put any money down, a credit application was prepared and submitted by VAW to VW Credit for $12,500, the full amount necessary to fund the purchase.[2]

At 12:05 p.m., while Pinto remained on the VAW premises, VAW received a fax from VW Credit containing VW Credit's approval of $11,990 in financing for Pinto's purchase of the Beetle. As a result, a $510 gap remained between the amount of financing approved by VW Credit and the total purchase price of the vehicle that had been agreed upon by Pinto and VAW. Despite this shortfall, Gary Carrington, the business manager of VAW, believed that he would ultimately be able to secure the full financing amount by resubmitting Pinto's credit application to VW Credit the following Monday. For this reason, Carrington proceeded to assist Pinto in completing the necessary paperwork memorializing the sale.

Among the various documents executed by Pinto and VAW on 30 April 2016 was a Conditional Delivery Agreement ("CDA"). The CDA stated, in pertinent part, as follows:

> DEALER'S obligations to sell the SUBJECT VEHICLE to PURCHASER and execute and deliver the manufacturer's certificate of origin or certificate of title to SUBJECT VEHICLE are expressly conditioned on FINANCE SOURCE'S approval of PURCHASER'S application for credit as submitted AND dealer being paid in full by FINANCE SOURCE.

Upon signing the documents provided to him by Carrington, Pinto drove the Beetle off the VAW lot that afternoon. Later that evening, Pinto was driving the Beetle when he was involved in a head-on collision (the "30 April Accident") with another vehicle being driven by Edward Smith.

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2. While the record is unclear on this issue, it appears that both VAW and VW Credit were under the mistaken impression that VAW owned the Beetle.

Smith's son, Archie, was a passenger in his vehicle. Pinto was killed in the collision, and both Edward Smith and Archie Smith were seriously injured.

Unaware of Pinto's death, Carrington resubmitted his credit application to VW Credit on 2 May 2016. At 4:40 p.m. that day, VW Credit faxed VAW its approval for the full $12,500 that VAW had requested. The following day, VAW paid off the balance owed to VW Credit under Copes' lease. On 9 May 2016, VW Credit executed a reassignment of title to VAW. VAW, in turn, transferred title to Pinto on 23 May 2016.

On 10 June 2017, the Smiths filed a lawsuit in Hoke County Superior Court that contained both negligence claims stemming from the 30 April Accident and a declaratory judgment claim seeking a determination as to "the nature and extent of insurance coverage provided to John Pinto, Jr. on April 30, 2016" as well as "the rights, status, and legal relations between the parties with respect to said insurance coverage." The complaint named as defendants Erie Insurance Company ("Erie"), the liability insurer for Pinto's Saturn; Universal Underwriters Insurance Company ("Universal"), the insurer that provided liability coverage for VAW; Pinto; and VAW.[3] On 22 August 2016, Erie filed a cross-claim seeking a declaratory judgment "as to the rights and obligations of . . . the insurer Defendants."

Universal filed a motion to dismiss the Smiths' claims for lack of standing on 16 August 2016. On 24 August 2016, the Smiths filed a motion for judgment on the pleadings. Motions for summary judgment were subsequently filed by the Smiths, Universal, and Erie.[4]

A hearing was held on the parties' motions before the Honorable Richard T. Brown on 13 March 2017. On 13 April 2017, Judge Brown issued an order stating, in pertinent part, as follows:

> [B]ased upon the undisputed facts, . . . [Universal] shall provide to the Defendant Estate of John Pinto, in connection with the automobile accident which is the subject of

3. Two other insurers, USAA Casualty Insurance Company ("USAA") and Zurich American Insurance Company ("Zurich"), were also originally named as defendants but were later dismissed from the lawsuit by the Smiths. It appears from the record that Pinto had unsuccessfully attempted to contact USAA on 30 April 2016 to inquire about the possibility of obtaining insurance for the Beetle. The record further indicates that Zurich had previously issued an insurance policy to VAW. In addition, although the complaint named Pinto as a defendant, Pinto's estate was later substituted as a party in his place. Finally, the Smiths also later dismissed VAW as a party.

4. The motions filed by the parties related solely to the declaratory judgment claims asserted by the Smiths and Erie.

> this lawsuit, primary insurance coverage in the amount of $500,000.00 and umbrella liability insurance coverage in the amount of $10,000,000.00 and . . . [Erie]'s liability policy provides excess coverage for the Defendant Estate of John Pinto, in connection with the automobile accident which is the subject of this lawsuit, after [Universal]'s policy limits of $10,500,000.00 have been exhausted.

The trial court's determination as to the respective coverage obligations of Universal and Erie was based on the court's ruling that N.C. Gen. Stat. § 20-75.1 governed the sale of the Beetle to Pinto.[5] Universal filed a timely notice of appeal.

Analysis

"On an appeal from an order granting summary judgment, this Court reviews the trial court's decision *de novo*." *Mitchell, Brewer, Richardson, Adams, Burge & Boughman v. Brewer*, __ N.C. App. __, __, 803 S.E.2d 433, 443 (2017) (citation and quotation marks omitted), *disc. review denied*, 370 N.C. 693, 811 S.E.2d 161 (2018). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Premier, Inc. v. Peterson*, 232 N.C. App. 601, 605, 755 S.E.2d 56, 59 (2014) (citation and quotation marks omitted).

It is well established that "[t]he moving party has the burden of demonstrating the lack of any triable issue of fact and entitlement to judgment as a matter of law. The evidence produced by the parties is viewed in the light most favorable to the non-moving party." *Hardin v. KCS Int'l, Inc.*, 199 N.C. App. 687, 695, 682 S.E.2d 726, 733 (2009) (internal citations omitted). We have held that "[a]n issue is 'genuine' if it can be proven by substantial evidence and a fact is 'material' if it would constitute or irrevocably establish any material element of a claim or a defense." *In re Alessandrini*, 239 N.C. App. 313, 315, 769 S.E.2d 214, 216 (2015) (citation omitted).

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5. N.C. Gen. Stat. § 20-75.1 sets out the circumstances under which a conditionally delivered vehicle remains covered under the car dealership's liability insurance policy in cases where the sale of the vehicle by the dealer is contingent upon the purchaser obtaining financing for the purchase.

I. Universal's Interlocutory Appeal

[1] As an initial matter, we must determine whether Universal's appeal is properly before us. *See Hous. Auth. of City of Wilmington v. Sparks Eng'g, PLLC*, 212 N.C. App. 184, 187, 711 S.E.2d 180, 182 (2011) ("[A]n appellate court has the power to inquire into jurisdiction in a case before it at any time, even *sua sponte*." (citation and quotation marks omitted)).

"A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Duval v. OM Hospitality, LLC*, 186 N.C. App. 390, 392, 651 S.E.2d 261, 263 (2007) (citation omitted). Conversely, an order or judgment is interlocutory if it does not settle all of the issues in the case but rather "directs some further proceeding preliminary to the final decree." *Heavner v. Heavner*, 73 N.C. App. 331, 332, 326 S.E.2d 78, 80, *disc. review denied*, 313 N.C. 601, 330 S.E.2d 610 (1985) (citation omitted).

"Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Paradigm Consultants, Ltd. v. Builders Mut. Ins. Co.*, 228 N.C. App. 314, 317, 745 S.E.2d 69, 72 (2013) (citation and quotation marks omitted). The prohibition against interlocutory appeals "prevents fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts." *Russell v. State Farm Ins. Co.*, 136 N.C. App. 798, 800, 526 S.E.2d 494, 496 (2000) (citation and brackets omitted).

> However, there are two avenues by which a party may immediately appeal an interlocutory order or judgment. First, if the order or judgment is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), an immediate appeal will lie. Second, an appeal is permitted under N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review.

N.C. Dep't of Transp. v. Page, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995) (internal citations omitted).

The trial court's 13 April 2017 order does not contain a certification under Rule 54(b). Therefore, Universal's appeal is proper only if it can demonstrate a substantial right that would be lost absent an immediate appeal. *See Embler v. Embler*, 143 N.C. App. 162, 166, 545 S.E.2d 259, 262 (2001) ("The burden is on the appellant to establish that a substantial

right will be affected unless he is allowed immediate appeal from an interlocutory order." (citation omitted)).

As our Supreme Court has noted, "the 'substantial right' test for appealability of interlocutory orders is more easily stated than applied." *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978). As a result, the extent to which an interlocutory order affects a substantial right must be determined on a case-by-case basis. *McCallum v. N.C. Coop. Extension Serv.*, 142 N.C. App. 48, 50, 542 S.E.2d 227, 231 (citation omitted), *appeal dismissed and disc. review denied*, 353 N.C. 452, 548 S.E.2d 527 (2001).

Universal contends that the trial court's order implicated a substantial right by determining that its policy provided coverage for Pinto such that Universal would be required to defend his estate in the underlying tort action. We agree.

It is well established that "[w]here there is a pending suit or claim, an interlocutory order concerning the issue of whether an insurer has a duty to defend in the underlying action affects a substantial right that might be lost absent an immediate appeal." *Cinoman v. Univ. of N.C.*, 234 N.C. App. 481, 483, 764 S.E.2d 619, 621-22 (citation and quotation marks omitted); *see also Lambe Realty Inv., Inc. v. Allstate Ins. Co.*, 137 N.C. App. 1, 4, 527 S.E.2d 328, 331 (2000) ("[T]he duty to defend involves a substantial right to both the insured and the insurer." (citation omitted)).

In the present case, Pinto was not a named insured of Universal. Consequently, Universal would not ordinarily be under any obligation to defend him or his estate in a civil action. However, by ruling that Universal's policy covered Pinto at the time of the 30 April Accident, the court's order implicated Universal's duty to defend Pinto's estate in this lawsuit and thus affected a substantial right. Therefore, Universal's appeal is properly before us.

II. Standing

[2] We must next address whether the Smiths or Erie possess standing to seek a declaration as to the liability insurance coverage obligations owed to Pinto's estate in connection with the 30 April Accident. The Smiths argue that they have standing as persons whose "rights, status or other legal relations" are affected by the operation of N.C. Gen. Stat. § 20-75.1. Universal contends, however, that the Smiths lack standing because "[i]t is the effect of the conditional delivery statute on [Pinto] and VAW which is at issue, not the Smiths." We agree that the Smiths do not possess standing.

North Carolina's Uniform Declaratory Judgment Act provides that "[c]ourts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed." N.C. Gen. Stat. § 1-253 (2017). "Before a declaratory judgment can be had, however, there must exist a real controversy of a justiciable nature." *DeMent v. Nationwide Mut. Ins. Co.*, 142 N.C. App. 598, 601, 544 S.E.2d 797, 799 (2001) (citation and quotation marks omitted). N.C. Gen. Stat. § 1-254 sets out the following criteria with regard to when persons are entitled to declaratory relief:

> Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder.

N.C. Gen. Stat. § 1-254 (2017).

This Court has stated that "[a] declaratory judgment may be used to determine the construction and validity of a statute, but the plaintiff must be *directly and adversely* affected by the statute." *Wake Cares, Inc. v. Wake Cty. Bd. of Educ.*, 190 N.C. App. 1, 11, 660 S.E.2d 217, 231 (2008), *aff'd*, 363 N.C. 165, 675 S.E.2d 345 (2009) (citation and quotation marks omitted) (emphasis added). With respect to contractual rights, we have held that "[w]hen a person is a third party to a contract, standing to seek a declaration as to the extent of coverage under an insurance policy requires that the party seeking relief have an enforceable contractual right under the insurance agreement." *Whitaker v. Furniture Factory Outlet Shops*, 145 N.C. App. 169, 174, 550 S.E.2d 822, 825 (2001) (citation and quotation marks omitted).

In *DeMent*, the plaintiff sustained injuries resulting from a car accident where the driver of the other vehicle failed to stop at a stop sign. *DeMent*, 142 N.C. App. at 599, 544 S.E.2d at 798. After the tortfeasor's insurer refused to pay for the plaintiff's medical expenses, the plaintiff sought a declaratory judgment construing the insurance policy at issue. We held that the plaintiff lacked standing, concluding that "[b]ecause the benefit running to [the] plaintiff by reason of the provision is merely incidental, he is without standing as a third-party beneficiary to seek enforcement of the covenant or a declaratory judgment as to its terms." *Id.* at 605, 544 S.E.2d at 801.

Whitaker involved a petitioner who loaned his motorcycle to Furniture Factory Outlet Shops ("Furniture Factory") to be used as a display in order to attract business to the store. *Id.* at 171, 550 S.E.2d at 823. The motorcycle was subsequently stolen from the store's premises. Following the theft, the petitioner filed a claim for the loss of his motorcycle with Furniture Factory's insurer, and the insurer denied the claim. The petitioner then sought a declaratory judgment that his loss was covered under the store's insurance policy. *Id.* This Court held that the petitioner lacked standing to seek a declaratory judgment, stating as follows:

> As in *DeMent*, the petitioner in this case is an incidental beneficiary to the insurance policy, and does not have a contractual right under N.C. Gen. Stat. § 1-253, and therefore, does not have standing. . . . Without a judgment against Furniture Factory, petitioner does not have an enforceable contractual right under the insurance policy. As a result, petitioner does not have standing to bring this action directly against respondent.

Id. at 175, 550 S.E.2d at 825-26 (quotation marks omitted).

In the present case, the Smiths were not named insureds under any of the insurance policies that potentially provided liability coverage to Pinto for his operation of the Beetle at the time of the 30 April Accident.[6] Thus, they lack standing to seek a declaration as to the extent to which coverage exists under those policies.

Nor do the Smiths possess standing to seek a determination as to whether N.C. Gen. Stat. § 20-75.1 applies to this case. As noted above, N.C. Gen. Stat. § 20-75.1 sets out the circumstances under which a conditionally delivered vehicle remains covered by a dealership's liability insurance policy in cases where the purchaser has not yet obtained financing for the purchase of the vehicle. The statute does not address the rights of third-party accident victims. Consequently, the Smiths are not "directly and adversely affected" by N.C. Gen. Stat. § 20-75.1 as would be required in order for them to possess standing to seek a declaration as to the statute's applicability to these facts. *Wake Cares*, 190 N.C. App. at 11, 660 S.E.2d at 231. For these reasons, we conclude that the Smiths lack standing to seek a declaratory judgment in this action.

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6. Nor do the Smiths make any argument that they were third-party beneficiaries under these policies.

[3] Our determination that the Smiths do not possess standing, however, does not end our standing analysis. Erie has also asserted a claim seeking a declaratory judgment as to its coverage obligations with regard to the 30 April Accident.

N.C. Gen. Stat. § 1-257 states, in pertinent part, as follows:

> [A] controversy between insurance companies, arising either by direct action or by joinder or intervention, with respect to which of two or more of the insurers is liable under its particular policy and the insurers' respective liabilities and obligations, constitutes a justiciable issue and the court should, upon petition by one or more of the parties to the action, render a declaratory judgment as to the liabilities and obligations of the insurers.

N.C. Gen. Stat. § 1-257 (2017).

Here, Erie is seeking a declaratory judgment as to its obligations in connection with the underlying tort action brought by the Smiths. N.C. Gen. Stat. § 1-257 expressly provides that such a controversy between insurance carriers "constitutes a justiciable issue" warranting the issuance of a declaratory judgment. Therefore, we are satisfied that Erie possesses standing to seek a declaratory judgment in order to determine the amount of coverage, if any, provided by its policy with regard to the 30 April Accident.

III. Joinder of Necessary Parties

[4] Although we have determined that Erie possesses standing to seek a declaratory judgment in this action, we nevertheless conclude that the trial court erred in ruling on Erie's claim for declaratory relief because of the absence of necessary parties to the litigation. North Carolina Rule of Civil Procedure 19(b) provides as follows:

> The court may determine any claim before it when it can do so without prejudice to the rights of any party or to the rights of others not before the court; but when a complete determination of such claim cannot be made without the presence of other parties, the court shall order such other parties summoned to appear in the action.

N.C. R. Civ. P. 19(b).

This Court has held that "[a] necessary party is one whose presence is required for a complete determination of the claim, and is one whose

interest is such that no decree can be rendered without affecting the party. In other words, a necessary party is one whose interest will be directly affected by the outcome of the litigation." *Begley v. Emp't Sec. Comm.*, 50 N.C. App. 432, 438, 274 S.E.2d 370, 375 (1981) (internal citations and quotation marks omitted). "When there is an absence of necessary parties, the trial court should correct the defect *ex mero motu* upon failure of a competent person to make a proper motion." *Rice v. Randolph*, 96 N.C. App. 112, 113, 384 S.E.2d 295, 297 (1989) (citation omitted). Furthermore, "[a] judgment which is determinative of a claim arising in an action in which necessary parties have not been joined is null and void." *Id.*

Our appellate courts have previously applied this principle in the context of declaratory judgment actions. *See, e.g.*, *N.C. Monroe Constr. Co. v. Guilford Cty. Bd. of Educ.*, 278 N.C. 633, 640, 180 S.E.2d 818, 822 (1971) (vacating declaratory judgment that invalidated award of construction contract because party awarded contract was "a necessary party in a proceeding to declare its contract with the defendant invalid and the court below could not properly determine the validity of that contract without making Barker-Cochran a party to the proceeding"); *Rice*, 96 N.C. App. at 114, 384 S.E.2d at 297 ("We believe that a dispute as to the extinguishment of a subdivision easement . . . cannot be resolved without the joinder of the grantor, or his heirs, who retain fee title to the soil[.]" (internal citations omitted)).

In the present case, it is clear that at all relevant times both VAW and VW Credit were operating as if VAW was the owner of the Beetle. But it is undisputed that the vehicle was instead owned by VW Credit. Thus, with regard to Pinto's attempt to purchase the Beetle on 30 April 2016, VAW was asking VW Credit to provide financing for the sale of a vehicle that VW Credit actually owned and as to which VAW appears to have had no legally recognized interest. Nevertheless, for reasons that are not apparent from the record, neither VW Credit nor any of its insurers were ever made parties to this lawsuit. Given VW Credit's status as the owner of the Beetle at the time of the 30 April Accident, no determination as to the insurance coverage available to Pinto's estate can be made without the joinder as parties to this action of VW Credit itself and/or any of its insurers who provided liability coverage to it that may apply to the accident.

Therefore, we must vacate the trial court's order and remand this case for joinder of these necessary parties. *See In re Foreclosure of a Lien by Hunter's Creek Townhouse Homeowners Assoc., Inc.*, 200 N.C. App. 316, 319, 683 S.E.2d 450, 453 (2009) (vacating and remanding trial

court's order in declaratory judgment action where court "should have intervened *ex mero motu*" to ensure joinder of a necessary party).

Conclusion

For the reasons stated above, we vacate the trial court's 13 April 2017 order and remand for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

Judges TYSON and INMAN concur.

STATE OF NORTH CAROLINA
v.
EDWARD M. ALONZO, DEFENDANT

No. COA17-1186

Filed 21 August 2018

1. Sexual Offenses—felonious child abuse by sexual act—jury instructions—pattern instructions inconsistent with case law

Although the definition of "sexual act" in the Pattern Jury Instructions for felonious child abuse by sexual act was inconsistent with controlling case law, the trial court's error in utilizing the inaccurate Pattern Jury Instructions in defendant's case did not rise to the level of plain error because defendant's argument regarding inconsistent verdicts was not convincing that, absent the error, the jury probably would have reached a different result.

2. Evidence—relevance—prejudicial and probative value—unrelated sexual assault

In defendant's trial for sexual offenses committed against his daughter, the trial court did not err by excluding defendant's proposed testimony concerning the rape of his other daughter by a neighbor, under Rules of Evidence 401 and 403. Defendant failed to show how the testimony would have a logical tendency to prove that he did not molest his daughter or how his wife's reporting of the rape by the neighbor would make her more likely to report the molestation by her husband; further, the testimony likely would have confused the jury.

Judge ARROWOOD concurring in the result only.

Appeal by Defendant from judgment entered 11 January 2017 by Judge Gale M. Adams in Cumberland County Superior Court. Heard in the Court of Appeals 5 June 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Ellen A. Newby, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel Shatz, for defendant-appellant.

MURPHY, Judge.

Defendant, Edward M. Alonzo, appeals his convictions of taking indecent liberties with a child and felony child abuse. These convictions result from the sexual conduct Defendant inflicted on his daughter, Sandy,[1] while the family resided in Fayetteville between 1990-1993. At issue is whether a trial court commits plain error by giving jury instructions that follow the present Pattern Jury Instruction, but are not in accordance with current law. Further, here, we must determine whether the trial court erred in excluding portions of Defendant's testimony under Rules 401 and 403. N.C.G.S. § 8C-1, Rules 401, 403. Upon review, we find no plain error, and no error, respectively.

BACKGROUND

Defendant began sexually molesting Sandy when she was only four years old. This assault continued as their military family moved throughout the United States and Europe. Despite Sandy informing her mother, Defendant's behavior persisted.

In 2012, having obtained the age of majority, Sandy contacted local, federal, and military authorities across the country regarding the molestation she endured as a child. When Sandy contacted the Cumberland County Sheriff's Department, where the family resided in Fayetteville from approximately 1990-1993, they ultimately informed her that there is no statute of limitations for felonies in North Carolina.[2]

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1. We refer to Defendant's daughter by a pseudonym as she was under the age of 18 at the time of the offenses.

2. *State v. Taylor*, 212 N.C. App. 238, 249, 713 S.E.2d 82, 90 (2011) ("In [North Carolina] no statute of limitations bars the prosecution of a felony." (citation omitted)).

A grand jury issued superseding indictments on 3 January 2017 against Defendant for taking indecent liberties with a child, felonious child abuse, and first degree statutory sexual offense. At trial, Ms. Alonzo (Defendant's ex-wife and Sandy's mother) testified that she witnessed Defendant molest Sandy sometime between December 1990 and January 1991, when Defendant was home on compassionate leave from the Army. Defendant attempted to testify that the reason for his compassionate leave was the rape of his other daughter by a neighbor. However, the trial court disallowed this testimony, deeming it both irrelevant and more prejudicial than probative. At the close of the trial, the judge instructed the jury using the Pattern Jury Instructions, including, *inter alia*, N.C.P.I.–Crim. 239.55B, the instruction for felonious child abuse.

On 11 January 2017, Defendant was convicted of taking indecent liberties with a child and felonious child abuse. The jury found him not guilty of first degree statutory sexual offense.[3] Defendant timely appealed, focusing on the jury instructions and the trial court's decision to exclude portions of his proposed testimony.

ANALYSIS

A. Jury Instructions

[1] At trial, Defendant failed to object to the instructions regarding the charge of felonious child abuse by sexual act in violation of N.C.G.S. § 14-318.4(a2) (1991).[4] Therefore, the trial court's decision will only be overturned upon a finding of plain error. *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012).

"[T]he North Carolina plain error standard of review [for jury instructions] applies only when the alleged error is unpreserved[.]" *Id.* "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

The trial court instructed the jury that:

> To find [Defendant] guilty of this offense the State must prove three things beyond a reasonable doubt: First, that

3. First degree statutory sexual offense is defined as "a sexual act with a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim." N.C.G.S. § 14-27.29(a) (2017).

4. For the purposes of this case, there is no substantive difference between N.C.G.S. § 14-318.4(a2) (1991) and the versions applied in the cases cited in this opinion.

> [Defendant] was the parent of [Sandy]. Second, that at the time [Sandy] had not yet reached her 16th birthday. Third, that [Defendant] committed a sexual act upon [Sandy]. A sexual act is an immoral, improper or indecent act by [Defendant] upon [Sandy] for the purpose of arousing, gratifying sexual desire.

These instructions track, almost precisely, the language of the North Carolina Pattern Jury Instruction, N.C.P.I.–Crim. 239.55B, the suggested instructions for the charge of felonious child abuse. "[T]he preferred method of jury instruction is the use of the approved guidelines of the North Carolina Pattern Jury Instructions." *Caudill v. Smith*, 117 N.C. App. 64, 70, 450 S.E.2d 8, 13 (1994) (citation omitted).

Defendant does not argue that the Pattern Jury Instruction is inapplicable to his case. Instead, Defendant takes issue with the language of the instruction and argues the definition of "sexual act" is incorrect, pointing to an inconsistency between the Pattern Jury Instruction and this Court's precedent. While Defendant's argument has merit, the error does not rise to the level of plain error here.

1. Inaccuracy of Pattern Jury Instruction

Defendant addresses a discrepancy between N.C.P.I.–Crim. 239.55B and our prior interpretation of a sexual act, as applied to N.C.G.S. § 14-318.4(a2). We have previously held that the definition of "sexual act" in N.C.G.S. § 14-318.4(a2) is the definition contained in N.C.G.S. § 14-27.1(4) (recodified as N.C.G.S. § 14-27.20(4)). *State v. Lark*, 198 N.C. App. 82, 88, 678 S.E.2d 693, 698 (2009). N.C.G.S. § 14-27.20(4) defines "sexual act" as:

> cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body: provided, that it shall be an affirmative defense that the penetration was for accepted medical purposes.

The State argues, and Defendant concedes, that a later decision of this Court diverges from this definition of sexual act, declining to extend the N.C.G.S. § 14-27.1(4) definition to N.C.G.S. § 14-318.4(a2). *State v. McClamb*, 234 N.C. App. 753, 758-59, 760 S.E.2d 337, 341 (2014) (citations omitted). As such, there is a conflict between our precedent. However, "when there are conflicting lines of opinions from this Court, we generally look to our earliest relevant opinion in order to resolve

the conflict." *State v. Meadows*, ___ N.C. App. ___, ___, 806 S.E.2d 682, 693 (2017), *cert. granted* ___, N.C. ___, 812 S.E.2d 847 (2018). As we are bound by our earlier decision in *Lark*, the State's argument regarding *McClamb* is without merit.

As a result, there is inconsistency between N.C.P.I.--Crim. 239.55B and our controlling interpretation of "sexual act" as applied to N.C.G.S. § 14-318.4(a2). *See Lark*, 198 N.C. App. at 88, 678 S.E.2d at 698. While the Pattern Jury Instruction allows a broader categorization of what qualifies as a "sexual act," our precedent defines the words more narrowly. *Compare id.*, *with* N.C.P.I.--Crim. 239.55B. We express concern about this split in definitions for "sexual act." This divergence indicates the necessity of updating the Pattern Jury Instructions to be in accordance with our precedent. *Lark*, 198 N.C. App. at 88, 678 S.E.2d at 698; N.C.P.I.–Crim. 239.55B. The Pattern Jury Instruction's definition of sexual act must conform with this Court's definition in *Lark*.

As binding precedent supports Defendant's claim of inaccurate jury instructions, we must now determine whether the trial court's use of the Pattern Jury Instruction constituted plain error.

2. Prejudice

In deciding whether this error in the Pattern Jury Instruction rises to the level of plain error, we first hold that Defendant's claim that "[t]he combination of the jury's verdicts finding [Defendant] not guilty of sex offense and guilty of . . . the [child abuse] charge directly establishes" plain error is unconvincing. Defendant argues that the proper definition of sexual act for the felonious child abuse charge "would have mirrored" the instruction the jury received for sexual act in relation to Defendant's first degree statutory sexual offense charge.[5] Defendant alleges the not guilty verdict on the sexual offense charge demonstrates that the jury had reasonable doubt that Defendant penetrated Sandy, and, that had the *Lark* definition of sexual act been given for the child abuse instruction, Defendant would have been found not guilty of that crime as well. Defendant's prejudice argument focuses on this alleged "inconsistency" between the jury's verdicts.

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5. The definition of "sexual act" given for the first degree statutory sexual offense charge was "any penetration, however slight, by an object into the genital opening of a person's body." The proper definition for sexual act in relation to the felonious child abuse charge is, in pertinent part, "penetration, however slight, by any object into the genital or anal opening of another person's body." *Lark*, 198 N.C. App. at 88, 678 S.E.2d at 698.

However, as inconsistent verdicts are not prima facie evidence of error, and as we are not convinced a proper jury instruction would have rendered a different verdict, we hold that the trial court's instructions did not prejudice the jury. *Lawrence*, 365 N.C. at 516, 723 S.E.2d at 333; *State v. Mumford*, 364 N.C. 394, 398-401, 699 S.E.2d 911, 914-16 (2010).

While verdicts that are "inconsistent and contradictory" indicate error, "verdicts that are merely inconsistent" may be both grounded in logic and not erroneous. *Mumford*, 364 N.C. at 398-401, 699 S.E.2d at 914-16. To determine whether conflicting verdicts are "merely inconsistent," or both "inconsistent and contradictory," we must look to the relationship between the charges. *Id.* Erroneous jury decisions occur when contradictory verdicts are "mutually exclusive," one guilty finding eliminating the possibility of an accurate guilty verdict on the other charges. *Id.* (citations omitted). However, the charges Defendant faced, indecent liberties with a child, felonious child abuse, and first degree statutory sexual offense, were not "mutually exclusive" because "guilt of one [did not] necessarily exclude[] guilt of the other[s]." *Id.* at 400, 699 S.E.2d at 915; *see State v. Farlow*, 336 N.C. 534, 444 S.E.2d 913 (1994) (establishing that the charges of indecent liberties with a child and first degree sexual offense are not mutually exclusive). Therefore, what Defendant proposes as inconsistencies within these jury verdicts, acquittal on the sexual offense charge, but guilty of the child abuse charge, does not rise to the level of plain error in the jury instructions. *Mumford*, 364 N.C. at 398-401, 699 S.E.2d at 914-16.

Further, we are not convinced the jury would reach a different result had the proper jury instruction been given. *Lark*, 198 N.C. App. at 88, 678 S.E.2d at 698; N.C.P.I.–Crim. 239.55B. "It is well established in North Carolina that a jury is not required to be consistent . . . ." *State v. Rosser*, 54 N.C. App. 660, 661, 284 S.E.2d 130, 131 (1981) (citations omitted). Since 1925, our Supreme Court has found validity in inconsistent jury verdicts, stating that:

> The offenses are designated in the statute separately, and while the jury would have been fully justified in finding the defendant guilty on both counts, under the evidence in this case, their failure to do so does not, as a matter of law, vitiate the verdict . . . .

State v. Sigmon, 190 N.C. 684, 691, 130 S.E. 854, 857 (1925). Furthermore, throughout North Carolina jurisprudence, our appellate courts have reaffirmed the legitimacy of inconsistent jury verdicts. *Rosser*, 54 N.C. App. at 661, 284 S.E.2d at 131; *State v. Davis*, 214 N.C. 787, 71 S.E.2d 104

(1939) (upholding jury verdicts finding Defendant guilty of transporting liquor for the purpose of selling it, but not guilty of possessing liquor).

As precedent dictates the validity of inconsistent verdicts, Defendant's argument of inconsistency indicating plain error fails to satisfy us "that absent the error, the jury probably would have reached a different result." *Jordan*, 333 N.C. at 440, 426 S.E.2d at 697. Therefore, we hold that the trial court's utilization of the Pattern Jury Instruction does not rise to the level of plain error.

Lark's definition of "sexual act" as applied from N.C.G.S. § 14-27.1(4) to N.C.G.S. § 14-318.4(a2) remains binding on our review and results in a split between the Pattern Jury Instruction and current law. *Lark*, 198 N.C. App. at 88, 678 S.E.2d at 698. However, the trial court's decision to follow the Pattern Jury Instruction did not rise to the level of plain error as Defendant failed to demonstrate that the jury would have reached a different verdict had correct jury instructions been given, with the proper definition of "sexual act." *Jordan*, 333 N.C. at 440, 426 S.E.2d at 697.

B. Exclusion of Testimony

[2] Defendant also appeals the trial court's exclusion of his proposed testimony regarding the sexual assault of his other daughter by a neighbor. Defendant alleges that his testimony concerning the sexual assault of his other daughter by a neighbor operates as substantive evidence of the fact that he did not sexually assault Sandy during his compassionate leave.[6] Defendant also alleges that this proposed testimony should have been allowed to impeach the testimony of Ms. Alonzo relating to her having witnessed Defendant sexually assault Sandy during his compassionate leave. On appeal, Defendant maintains that his testimony informing the jury of the sexual assault of his other daughter proves that he "would have been sufficiently deterred" from molesting Sandy during that same time period as "Ms. Alonzo [was] watching him like a hawk." Further, Defendant alleges that his testimony would "discredit[] Ms. Alonzo's testimony" that she saw him sexually assault Sandy, making her explanation for not contacting the police after witnessing his acts "less convincing."

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6. At trial, Defendant argued that this part of his testimony would show that "he wouldn't have molested [Sandy] in Fayetteville because of the trauma, because of the all of the things that the family would have had to have gone through and that new ordeal, that new situation would have made him less likely to molest [Sandy]."

The trial court found Defendant's proposed testimony irrelevant under N.C.G.S. § 8C-1, Rule 401, and alternatively found that it did not satisfy the balancing test of N.C.G.S. § 8C-1, Rule 403. On appeal, the trial court's Rule 401 decisions are "given great deference." *Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (citation omitted). A trial court's ruling under Rule 403's balancing test will not be disturbed absent an abuse of discretion. *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008).

1. Substantive Use

a. Rule 401

Defendant claims that his testimony regarding the unrelated sexual assault of his other daughter offers substantive, relevant evidence that he did not sexually molest Sandy during his compassionate leave. "In order to be relevant, the evidence must have a logical tendency to prove any fact that is of consequence in the case being litigated." *State v. Griffin*, 136 N.C. App. 531, 550, 525 S.E.2d 793, 806 (internal quotation marks and citation omitted) (2000). Defendant, however, fails to establish how his proposed testimony concerning the sexual assault of his other daughter by another person would have the "logical tendency to prove" he was therefore less likely to assault Sandy. *Id.* As Defendant's arguments fail to establish this alleged correlation, his proposed testimony does not "have a logical tendency to prove" that Defendant would not have sexually molested Sandy. *Id.*; N.C.G.S. § 8C-1, Rule 401. As we give "great deference" to the trial court, we decline to disturb the trial court's Rule 401 relevancy ruling. *Dunn*, 162 N.C. App. at 266, 591 S.E.2d at 17.

b. Rule 403

Further, assuming *arguendo* that Defendant's evidence regarding the sexual assault of his other daughter was relevant, the trial court did not abuse its discretion in excluding the testimony. *Whaley*, 362 N.C. at 160, 655 S.E.2d at 390; N.C.G.S. § 8C-1, Rule 403. "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). Rule 403 requires the trial court to balance the prejudicial and probative value of any evidence, admitting only evidence that benefits rather than hinders the jury's deliberation. N.C.G.S. § 8C-1, Rule 403. The testimony concerning the sexual assault of another child by an unrelated, third-party had the potential to confuse the jury, outweighing any probative value, and it was therefore not an abuse

of discretion for the trial court to exclude Defendant's testimony as it related to the production of allegedly substantive evidence.[7]

2. Impeachment Use

At trial and on appeal, Defendant also maintains that his testimony could have been used to impeach Ms. Alonzo's testimony that he sexually assaulted Sandy.

a. Rule 401

Defendant asserts that because Ms. Alonzo reported the sexual assault of their other daughter by a neighbor, she therefore would have reported any assault she witnessed him commit. Defendant further alleges that because Ms. Alonzo did not file any reports, the jury could have therefore determined there was no sexual assault. We agree with the State that Ms. Alonzo turning in a neighbor for sexual assault is entirely different, psychologically and emotionally, than turning in her husband. Without an established correlation between turning in neighbors and husbands for sexual assault, Defendant's proposed testimony does not "have a logical tendency to prove" that Ms. Alonzo was incorrect or untruthful in her testimony. *Griffin*, 136 N.C. App. at 550, 525 S.E.2d at 806. We decline to disturb the trial court's determination on the testimony's relevancy.

b. Rule 403

Further, the trial court did not abuse its discretion in excluding this testimony under Rule 403. *Whaley*, 362 N.C. at 160, 655 S.E.2d at 390; N.C.G.S. § 8C-1, Rule 403. Rule 403's balancing test mandates the exclusion of prejudicial or otherwise inapplicable evidence when "its probative value is substantially outweighed" by its prejudicial or inapplicable nature. N.C.G.S. § 8C-1, Rule 403. As previously stated, testimony concerning the sexual assault of another child by an unrelated, third-party had the potential to confuse the jury, outweighing any probative value. It was not an abuse of discretion for the trial court to exclude Defendant's proposed testimony as it related to the impeachment of Ms. Alonzo's testimony.

CONCLUSION

The current Pattern Jury Instruction concerning the definition of "sexual act" in N.C.G.S. § 14-318.4(a2) requires immediate attention by

7. The trial court stated that "I don't find that [the proposed testimony] is more probative than would be, as the State has indicated, confusing to the jury why we're even delving into issues regarding the other daughter."

the North Carolina Conference of Superior Court Judges Committee on Pattern Jury Instructions or our Supreme Court. Clarity is necessary so that the law may be uniformly applied in all trials throughout the State. Here, however, the trial court's decision to utilize N.C.P.I.–Crim. 239.55B did not rise to the level of plain error. Additionally, we uphold the trial court's decision to exclude portions of Defendant's proposed testimony regarding the unrelated sexual assault of his other daughter by another person under Rule 401 and find it was not an abuse of discretion for the trial court to exclude this testimony under Rule 403.

NO PLAIN ERROR IN PART; NO ERROR IN PART.

Judge CALABRIA concurs.

Judge ARROWOOD concurs in result only.

STATE OF NORTH CAROLINA
v.
JEFFREY KEITH HOBSON

No. COA17-1052

Filed 21 August 2018

1. Stalking—jurisdiction—subject matter—indictment—presentment

Although defendant argued that the trial court lacked subject matter jurisdiction over a misdemeanor charge of stalking because the charge was not initiated by a presentment prior to indictment, the amended record on appeal contained a certified copy of the presentment.

2. Evidence—stalking prosecution—domestic violence protective order—redacted—prejudice analysis

The trial court did not abuse its discretion in a stalking prosecution by admitting domestic violence protective orders and related findings where the trial court redacted the orders and gave limiting instructions.

3. Evidence—stalking—testimony of incidents with another woman—plain error analysis

The trial court did not plainly err in a stalking prosecution by admitting the testimony of defendant's prior girlfriend regarding his

assault on her, and relating her communications with the prosecuting victim, where the challenged portions of the prior girlfriend's testimony were relevant not only to show defendant's propensity for stalking but to show that the prosecuting victim was in reasonable fear of defendant.

4. Evidence—photographs of firearms, weapons, surveillance equipment—irrelevant—prejudice outweighed by other evidence

In a stalking prosecution, photographs of legally owned firearms, ammunition, and surveillance equipment found in defendant's home were irrelevant, and the probative value of the evidence was outweighed by the danger of unfair prejudice. The trial court abused its discretion in admitting the photographs; however, in light of the overwhelming other evidence, the admission of the photographs did not amount to prejudicial error.

5. Stalking—motion to dismiss—sufficiency of the evidence—defendant as perpetrator

The trial court did not err by denying defendant's motion to dismiss a charge of misdemeanor stalking where defendant contended that he was not the perpetrator. There was testimony from defendant's previous girlfriend that he had mailed derogatory flyers.

Appeal by defendant from judgment entered 10 March 2017 by Judge Imelda J. Pate in New Hanover County Superior Court. Heard in the Court of Appeals 2 May 2018.

Attorney General Joshua H. Stein, by Assistant Attorney Generals Stuart M. Saunders and Teresa M. Postell, for the State.

Lisa S. Costner for defendant.

ELMORE, Judge.

Defendant Jeffrey Keith Hobson appeals from judgment entered upon a jury verdict finding him guilty of misdemeanor stalking. On appeal, defendant raises five assignments of error related to the trial court's subject-matter jurisdiction; its admission of certain evidence, including civil domestic violence protective orders, portions of defendant's ex-girlfriend's testimony, and various photographs; and its denial of his motion to dismiss.

Although the trial court may have abused its discretion in admitting into evidence approximately twenty-eight photographs of firearms,

ammunition, and surveillance equipment found throughout defendant's home, we nevertheless conclude that defendant received a fair trial, free from prejudicial error.

Background

The evidence at trial tended to show that defendant and the victim, Lorrie, were in a dating relationship for approximately four to five months beginning in late 2009. The relationship was not serious or exclusive, and it ended when defendant moved from Wilmington to Greensboro in early 2010.

In October 2010, Lorrie began working at Gold's Gym in Wilmington. When defendant moved back to Wilmington in early 2011, he began making persistent and unwelcome attempts to reconnect with Lorrie, which included repeatedly coming to her workplace and staring at her, calling and texting her, leaving a note on her vehicle, and sending derogatory letters about Lorrie to her father and boyfriend. When Lorrie's ex-husband asked defendant to leave her alone, defendant indicated that "he would make [her] pay and he would not leave [her] alone." Defendant was eventually banned from and escorted out of Gold's Gym by law enforcement.

In February 2012, Lorrie filed a complaint for and obtained a civil domestic violence protective order (DVPO) against defendant pursuant to N.C. Gen. Stat. § 50B. The DVPO provided that defendant not harass or interfere with Lorrie or her children, that he stay away from Lorrie's residence and workplace, and that he surrender all firearms in his possession to law enforcement. In February 2013, Lorrie sought and was granted a renewal of the DVPO for an additional twelve months based on her continued fear of defendant as well as defendant's conduct in approaching Lorrie and her children at a Halloween outing in 2012, while the initial DVPO was still in effect, to ask "if [she] was still mad at him." Defendant was present at both the initial hearing in 2012 and the renewal hearing in 2013, and redacted versions of the DVPOs as well as the filings related thereto were admitted into evidence at trial. Lorrie did not seek an additional renewal of the DVPO, which expired in February 2014.

In October 2014, a deputy with the New Hanover County Sheriff's Office responded to a home "in reference to somebody stating that they had received a letter . . . in the mail that appeared to be a flyer for prostitution." The flyer, which had been mailed to countless residents of New Hanover County, stated that Lorrie was a prostitute with sexually

transmitted diseases, and it included her photograph, home address, cell phone number, work address, and work number. Lorrie told law enforcement that she suspected defendant was responsible for the flyers.

Defendant's ex-girlfriend, Holly, testified that she began a dating relationship with defendant in 2010, and he moved into her Wilmington home in May 2011. Holly was aware of defendant's attempts to reconnect with Lorrie. According to Holly, defendant wanted to find out why Lorrie had stopped seeing him, he was angry that Lorrie would not accept his calls, and he expressed a hatred for Lorrie and a desire to make her miserable; defendant "wanted revenge" and "he said [Lorrie] would deserve whatever she got." Sometime after Lorrie obtained the DVPO against defendant, defendant showed Holly a copy of the flyer concerning Lorrie, told Holly that he intended to mail the flyers, and asked Holly for the addresses of people in her neighborhood. Defendant also told Holly "not to say anything and to forget that [she] ever saw it," which Holly stated she interpreted as a threat.

Holly further testified that in January 2013, defendant fractured her nose during an argument about defendant's inappropriate communications with other women. Holly pressed assault charges against defendant, but later requested that the charges be dismissed. Holly explained that she was "afraid that if [she] continued with the charges that [she] would be punished somehow," that defendant was embarrassed and angry about being arrested for assault, and that defendant told her "he would never be arrested again" and "he would not be taken alive." Holly thereafter discovered a stack of the flyers concerning Lorrie among defendant's belongings, and she took one as "[she] was afraid that the same thing would have been done to [her], and [she] wanted to have proof of what [defendant] was capable of." Holly texted Lorrie about the assault and warned Lorrie to be careful, but she did not mention the flyers. Holly did not submit her copy of the flyer to law enforcement until October 2014, after the others had been mailed.

In December 2014, law enforcement officers executed a search warrant at defendant's residence. Firearms, ammunition, and surveillance equipment were located throughout the home, and approximately twenty-eight photographs of those items were admitted into evidence at trial. No white envelopes, American flag stamps, or images or other documents depicting Lorrie as a prostitute were found in the home.

At the conclusion of the State's evidence, defendant moved to dismiss the charge on the basis that "the State ha[d] failed on elements of the crime." The trial court denied the motion. Defendant did not present

any evidence on his behalf but renewed his motion to dismiss, which the trial court again denied. The trial court then charged the jury as follows:

> If you find from the evidence beyond a reasonable doubt that on or about the alleged dates the defendant willfully on more than one occasion harassed or engaged in a course of conduct directed at the victim without legal purpose, and that the defendant at that time knew or should have known that the harassment or course of conduct would cause a reasonable person to fear for that person's safety or the safety of that person's immediate family, or would cause a reasonable person to suffer substantial distress by placing that person in fear of death or bodily injury or continued harassment, it would be your duty to return a verdict of guilty.
>
> If you do not so find, or if you have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

Following the guilty verdict, the trial court sentenced defendant to 75 days' imprisonment, suspended on the condition that he serve 60 months' supervised probation. The trial court also ordered that defendant serve 18 days in the New Hanover County jail and pay $195.00 in costs as well as a $2,000.00 fine. Defendant appeals.

Discussion

On appeal, defendant contends the trial court (I) lacked subject-matter jurisdiction over the misdemeanor charge of stalking; (II) abused its discretion in admitting Lorrie's DVPOs against defendant into evidence; (III) erred in failing to exclude from evidence certain portions of Holly's testimony; (IV) abused its discretion in admitting into evidence numerous photographs of firearms, ammunition, and surveillance equipment located throughout defendant's home; and (V) erred in denying defendant's motion to dismiss the charge for insufficiency of the evidence.

I. Subject-Matter Jurisdiction

[1] As an initial matter, defendant asserts that the trial court lacked subject-matter jurisdiction over the misdemeanor charge of stalking "where the charge was not initiated by a grand jury presentment prior to indictment."

The State is required to prove subject-matter jurisdiction in the trial court beyond a reasonable doubt. *State v. Batdorf*, 293 N.C. 486, 494,

238 S.E.2d 497, 502 03 (1977). When the record on appeal affirmatively shows a lack of subject-matter jurisdiction in the trial court, this Court will arrest judgment or vacate any order entered without authority. *State v. Petersilie*, 334 N.C. 169, 175, 432 S.E.2d 832, 836 (1993) (citation omitted). "Whether a trial court has subject-matter jurisdiction is a question of law, reviewed *de novo* on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) (citation omitted).

In the instant case, a grand jury indicted defendant for the offense of stalking pursuant to N.C. Gen. Stat. § 14-277.3A, which provides that "[a] violation of this section is a Class A1 misdemeanor." N.C. Gen. Stat. § 14-277.3A(d) (2017). While "the district court division has exclusive, original jurisdiction for the trial of criminal actions . . . below the grade of felony, and the same are hereby declared to be petty misdemeanors," N.C. Gen. Stat. § 7A-272(a) (2017), the superior court has jurisdiction to try a misdemeanor "[w]hen the charge is initiated by presentment," N.C. Gen. Stat. § 7A-271(a)(2) (2017).

> A presentment is a written accusation by a grand jury, made on its own motion and filed with a superior court, charging a person . . . with the commission of one or more criminal offenses. A presentment does not institute criminal proceedings against any person, but the district attorney is obligated to investigate the factual background of every presentment returned in his district and to submit bills of indictment to the grand jury dealing with the subject matter of any presentments when it is appropriate to do so.

N.C. Gen. Stat. § 15A-641(c) (2017). Simply stated, "a presentment amounts to nothing more than an instruction by the grand jury to the public prosecuting attorney to frame a bill of indictment." *State v. Wall*, 271 N.C. 675, 682, 157 S.E.2d 363, 368 (1967) (citation omitted).

Defendant contends no evidence in the record on appeal shows a presentment was filed with the superior court in accordance with N.C. Gen. Stat. § 15A-641(c). However, the amended record contains a certified copy of the presentment issued by the grand jury on 15 December 2014 and filed with the superior court on 28 January 2015. Thus, because the stalking charge was properly initiated by a presentment, we conclude that the superior court had subject-matter jurisdiction over the misdemeanor pursuant to N.C. Gen. Stat. § 7A-271(a)(2). *See Petersilie*, 334 N.C. at 178, 432 S.E.2d at 837 ("When the record is amended to add the presentment, it is clear the superior court had jurisdiction[.]"). Defendant's argument is dismissed.

II. Domestic Violence Protective Orders

[2] Defendant next contends the trial court abused its discretion in admitting the DVPOs and filings related thereto into evidence. He asserts that the findings of fact contained in the DVPOs had unfairly prejudiced defendant and "would have been confusing to the jury as to the issues" to be determined at trial.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2017). Whether the probative value of relevant evidence is substantially outweighed by " 'the danger of unfair prejudice, confusion of the issues, or misleading the jury' " such that the evidence should be excluded is a determination within the trial court's sound discretion. *State v. Hyde*, 352 N.C. 37, 54-55, 530 S.E.2d 281, 293 (2000) (quoting N.C. Gen. Stat. § 8C-1, Rule 403 (1999)). "Such a decision may be reversed for abuse of discretion only upon a showing that the trial court's ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Handy*, 331 N.C. 515, 532, 419 S.E.2d 545, 554 (1992) (citations, quotation marks, and brackets omitted).

Prior to trial in the instant case, defendant made an oral motion *in limine* to exclude the DVPOs from evidence. Defendant specifically objected to "anything going beyond just evidence that the [DVPO] was entered by the District Court Judge," asserting that it "would not give the defendant a fair opportunity to defend himself if we have put before the jury judicial findings. The jury may be confused and say, 'Well, a judge in District Court found that happened, so we're bound by that.' " In response, the State emphasized that defendant had been present for and given an opportunity to be heard at both DVPO hearings; that the elements of the stalking offense required proof that a reasonable person in the victim's circumstances would fear for her safety; and that the history between defendant and Lorrie as evidenced by and described within the DVPOs was therefore directly relevant to a fact of consequence at trial.

We agree the DVPOs were relevant to show defendant's course of conduct as well as his motive to commit the offense of stalking. *See State v. Morgan*, 156 N.C. App. 523, 526-27, 577 S.E.2d 380, 384 (2003) (holding that evidence of prior and expired DVPOs was admissible to show defendant's intent to kill). After reviewing the DVPOs, the trial court redacted those portions it found to be unfairly prejudicial to defendant, and only the redacted versions were admitted into evidence

and published to the jury. As to defendant's argument that the jury was highly likely to regard the findings contained in the DVPOs as true and binding simply because they had been handwritten by a district court judge, the trial court's instructions to the jury included the following relevant excerpts:

> Members of the jury, all of the evidence has been presented. It is now your duty to decide from this evidence what the facts are.
>
> The defendant is presumed innocent. The State must prove to you that the defendant is guilty beyond a reasonable doubt.
>
> You are the sole judges of the weight to be given any evidence.
>
> The law requires the presiding judge to be impartial. You should not infer from anything that I have done or said that the evidence is to be believed or to be disbelieved, that a fact has been proven, or what your findings ought to be. It is your duty to find the facts and render a verdict reflecting the truth.

Given that the trial court redacted the DVPOs and properly instructed the jury regarding the State's burden of proof as well as the jury's duty "to find the facts," we conclude that the trial court did not abuse its discretion in admitting the DVPOs and related filings into evidence.

III. Rule 404(b) Testimony

[3] Defendant next contends the trial court erred in failing to exclude Holly's testimony that defendant had assaulted her in the past, that she was afraid of defendant, and that defendant told Holly "he would never be arrested again" and "he would not be taken alive." Defendant asserts that this testimony was only relevant to show propensity, or that defendant was a "bad guy," and does not fit within an exception listed in Rule 404(b) of the Rules of Evidence.

At the outset, we note that defendant filed a motion *in limine* to exclude from evidence the fact that he had been charged with assaulting Holly, arguing that "the charge was dismissed by the State, having at this point little or no probative value." In response, the State represented to the trial court that it did not intend to introduce evidence of the charge or of defendant's arrest, but it did expect Holly to testify regarding the assault itself. The State argued that the testimony was directly relevant

because it bore on the victim's reasonable fear of defendant. Defendant later withdrew his motion, explaining, "If the State is going to be allowed to . . . have [Holly] testify that there was an assault, then I want to get in the end result of that."

Defendant did not object during trial to any portion of Holly's testimony that he now challenges on appeal. Nevertheless, he contends the testimony should have been excluded by the trial court as it does not fit within any of the exceptions listed in Rule 404(b). He further argues that the testimony should have been excluded as unfairly prejudicial pursuant to Rule 403.

Unpreserved errors in criminal cases are reviewed for plain error only. N.C. R. App. P. 10(a)(4). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted). That is, the defendant must prove that "absent the error the jury probably would have reached a different verdict." *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (citation omitted).

Pursuant to Rule 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2017). "It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." *Id*. This list of permissible purposes is not exclusive, and "the fact that evidence cannot be brought within a listed category does not necessarily mean that it is inadmissible." *State v. Groves*, 324 N.C. 360, 370, 378 S.E.2d 763, 769 (1989) (citation, quotation marks, and brackets omitted). Rather, there is a general rule of inclusion regarding "relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990).

Here, the challenged portions of Holly's testimony were relevant not only to show defendant's propensity to commit the offense of stalking, but also established that the victim, Lorrie, was in reasonable fear of defendant. Holly testified to texting Lorrie about the assault and warning Lorrie to be careful, and that Holly herself was afraid of defendant. This portion of Holly's testimony demonstrates both that Lorrie had a legitimate basis for her fear of defendant and that her fear was reasonable

as required by N.C. Gen. Stat. § 14-277.3A. Similarly, defendant's statements to Holly—that "he would never be arrested again" and "he would not be taken alive"—were made in reference to the assault and further illustrate a course of conduct that would cause a reasonable person to fear for her safety.

Under these circumstances, defendant has failed to show that the trial court plainly erred in admitting the challenged portions of Holly's testimony.

IV. Photographic Evidence

[4] Defendant next asserts that the trial court abused its discretion in admitting into evidence approximately twenty-eight photographs of firearms, ammunition, and surveillance equipment found throughout defendant's home during the execution of the search warrant. He contends that because "[t]here was no evidence of the use or presence of a firearm with regard to this offense, and no evidence that [defendant] used surveillance equipment in the commission of the crime of stalking," the probative value of the photographs was substantially outweighed by the danger of unfair prejudice.

Pursuant to Rule 403 of the Rules of Evidence, in determining whether to admit photographic evidence, the trial court must weigh the probative value of the photographs against the danger of unfair prejudice to defendant. *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). Whether photographic evidence is admissible under Rule 403 is within the sound discretion of the trial court, and its ruling will not be reversed on appeal absent an abuse of discretion. *Id.*

In the instant case, the photographs of defendant's firearms, ammunition, and surveillance equipment—all of which defendant legally possessed at the time the search warrant was executed—were wholly irrelevant to the issue of whether defendant had committed the offense of stalking. We therefore agree with defendant that the probative value of the photographs was substantially outweighed by the danger of unfair prejudice, and the trial court should have exercised its discretion by excluding the photographs. However, in light of the overwhelming additional evidence presented at trial, we conclude defendant has failed to show that the admission of the photographs amounted to prejudicial error.

V. Motion to Dismiss

[5] In his final assignment of error, defendant challenges the trial court's denial of his motion to dismiss the charge of misdemeanor stalking

where he contends the State "failed to prove that [defendant] was the person who created and mailed the inflammatory flyers."

"When ruling on a defendant's motion to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted). "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *Smith*, 186 N.C. App. at 62, 650 S.E.2d at 33.

On appeal, defendant does not assert that the State failed to present substantial evidence of each element of the stalking offense; rather, his sole argument is that there was insufficient evidence of defendant being the perpetrator of the offense. According to defendant, the only evidence linking him to the flyer was Holly's testimony, which he maintains was "inadmissible and prejudicial."

As discussed in section III above, Holly's testimony was not inadmissible or unfairly prejudicial to defendant. Moreover, her testimony was subject to cross-examination, during which Holly admitted to having been embarrassed defendant was trying to reconnect with Lorrie; that she and defendant had disputes regarding money and property after their relationship ended; that she owned a computer and printer; that she did not inform Lorrie or law enforcement about the flyer when she first discovered it; that her computer was never examined by law enforcement; and that she takes medications for mental health issues.

While defendant attempted at trial to raise doubt about the identity of the person who mailed the flyers—insinuating that Holly could have been the culprit—and although he challenges certain portions of Holly's testimony on appeal, he raises no challenge to that portion of Holly's testimony in which she stated defendant showed her a copy of the flyer, told her that he intended to mail them, and asked her for addresses, nor does he challenge Holly's claim to have found a stack of the flyers among defendant's belongings. We therefore conclude the State presented substantial evidence to support a conclusion that defendant was the perpetrator of the offense, and the trial court did not err in denying defendant's motion to dismiss.

Conclusion

Although we agree with defendant that the trial court abused its discretion under Rule 403 in admitting into evidence numerous photographs of firearms, ammunition, and surveillance equipment found throughout defendant's home, for the reasons stated herein, we conclude that defendant received a fair trial, free from prejudicial error.

NO PREJUDICIAL ERROR.

Judges TYSON and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
DONNA HELMS LEDBETTER

No. COA15-414-3

Filed 21 August 2018

1. Motor Vehicles—driving while impaired—statutory requirements—procedure to observe condition—oral notice

In a driving while impaired case, defendant did not show irreparable prejudice to the preparation of her case due to the magistrate's failure to inform her in writing of her right under N.C.G.S. § 20-38.4 to have witnesses appear at the jail to observe her condition. Although the magistrate did not fully comply with the statute's requirements, the magistrate did orally inform defendant of the right to have her condition observed, and defendant was allowed to make several phone calls to friends and family after being detained.

2. Motor Vehicles—driving while impaired—statutory requirements—detention—written findings

In a driving while impaired case, the Court of Appeals rejected defendant's argument that her motion to dismiss should have been granted on the basis that the magistrate violated N.C.G.S. § 15A-534 by accidentally deleting from his order written findings regarding his reasons for imposing a secured bond. Defendant failed to demonstrate irreparable prejudice to the preparation of her case where the trial court's findings, supported by competent evidence, showed that the magistrate considered the statutory factors before setting a secured bond and before ordering defendant to be held until a certain time unless released to a sober adult.

3. Appeal and Error—driving while impaired—statutory violations—per se prejudice analysis

In a driving while impaired (DWI) case, defendant failed to show she was per se prejudiced by the magistrate's statutory violations in the absence of any evidence the State deprived defendant of access to potential witnesses or an attorney, or any argument by defendant that evidence was gathered in violation of her constitutional or statutory rights and should have been suppressed. The Court of Appeals found no grounds to grant a writ of certiorari to review the denial of defendant's motion to dismiss where defendant voluntarily pleaded guilty to DWI prior to analysis of her blood sample, she stipulated to a factual basis for the DWI, and she received the benefit of her plea bargain by having two drug charges dismissed.

Judge ARROWOOD concurring in the result.

Appeal by Donna Helms Ledbetter ("Defendant") from judgment entered 27 October 2014 by Judge Jeffrey P. Hunt in Rowan County Superior Court. Originally heard in the Court of Appeals 8 October 2015, and reconsidered by opinion issued 6 December 2016. *State v. Ledbetter*, __ N.C. App. __, 794 S.E.2d 551 (2016). Upon remand from the Supreme Court of North Carolina by opinion issued 8 June 2018. *State v. Ledbetter*, __ N.C. __, 814 S.E.2d 39 (2018).

Attorney General Joshua H. Stein, by Assistant Attorneys General Christopher W. Brooks and Ashleigh P. Dunston, for the State.

Meghan A. Jones for defendant-appellant.

TYSON, Judge.

I. Background

The facts underlying this case are set forth in our previous opinion, *State v. Ledbetter*, 243 N.C. App. 746, 779 S.E.2d 164 (2015). The procedural history is contained in *State v. Ledbetter*, __ N.C. __, 814 S.E.2d 39 (2018). Pursuant to the Supreme Court's instructions, we "exercise [our] discretion to determine whether [we] should grant or deny [D]efendant's petition for writ of certiorari." *Id.* at __, 814 S.E.2d at 43 (2018).

II. Writ of Certiorari

"A writ of *certiorari* is an extraordinary remedial writ[.]" *State v. Roux*, 263 N.C. 149, 153, 139 S.E.2d 189, 192 (1964) (citation omitted).

"*Certiorari* is a discretionary writ, to be issued only for good and sufficient cause shown." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) (citation omitted), *cert. denied*, 362 U.S. 917, 4 L. Ed. 2d 738 (1960).

"The decision concerning whether to issue a writ of certiorari is discretionary, and thus, the Court of Appeals *may* choose to grant such a writ to review . . . issues that are meritorious *but not* [for issues] for which a defendant has failed to show good or sufficient cause." *State v. Ross*, 369 N.C. 393, 400, 794 S.E.2d 289, 293 (2016) (emphasis supplied and citation omitted).

In deciding whether to grant Defendant's petition, Defendant's arguments must demonstrate "good and sufficient cause" to support this Court's exercise of its discretion to grant her petition and issue the writ of certiorari. *Id.*

[1] Defendant asserts the trial court prejudicially erred in denying her motion to dismiss, because the State violated N.C. Gen. Stat. § 20-38.4, N.C. Gen. Stat. § 15A-534, and *State v. Knoll*, 322 N.C. 535, 369 S.E.2d 558 (1988), when the magistrate: (1) failed to provide Defendant a written copy of Form AOC-CR-271, advising of her right to have witnesses observe her demeanor in jail; and, (2) failed to enter sufficient findings of fact to show Defendant was a danger to herself and others to justify imposing a secured bond pursuant to N.C. Gen. Stat. § 15A-534.

"Dismissal of charges for violations of statutory rights is a drastic remedy which should be granted sparingly. Before a motion to dismiss should be granted [. . .] it must appear that the statutory violation caused *irreparable prejudice* to the preparation of defendant's case." *State v. Labinski*, 188 N.C. App. 120, 124, 654 S.E.2d 740, 742-43 (emphasis original) (citation and internal quotation marks omitted), *review denied*, 362 N.C. 367, 661 S.E.2d 889 (2008).

With regard to Defendant's first argument, the State concedes the magistrate did not comply with N.C. Gen. Stat. § 20-38.4 to inform Defendant "in writing of the established procedure to have others appear at the jail to observe [her] condition" and failing to require her "to list all persons [she] wishes to contact and telephone numbers on a form that sets forth the procedure for contacting the persons listed." N.C. Gen. Stat. § 20-38.4 (2017).

The State argues Defendant cannot demonstrate "irreparable prejudice to the preparation of defendant's case" because the magistrate orally informed Defendant of her right to have witnesses present to observe her condition. *Labinski*, 188 N.C. App. at 124, 654 S.E.2d at 742-43. In its order denying Defendant's motion to dismiss, the trial court found:

> 45. Magistrate Wyrick testified he did tell the defendant of her right to have individuals come to the detention center to observe her condition.
>
> . . . .
>
> 47. Once placed in the Rowan County Detention Center, the defendant was allowed to make phone calls to her mother (several calls), to her brother (1 call), to Kenneth Paxton and a girlfriend Alisha.

These findings of fact are supported by competent evidence in the record through the testimony of Magistrate Wyrick and Defendant's own testimony that she was able to, and did, in fact, make several phone calls from jail to friends and family. Defendant cannot demonstrate the statutory violation caused her to suffer any "irreparable prejudice to the preparation of defendant's case." *Id.*

[2] With regard to Defendant's second argument, she argues the magistrate violated N.C. Gen. Stat. § 15A-534, which requires a magistrate to record, "in writing," findings for imposing a secured bond upon a defendant, and to consider the factors listed under N.C. Gen. Stat. § 15A-534(c). N.C. Gen. Stat. 15A-534(a)-(c) (2017). Defendant contends the magistrate's failure to comply with these statutory obligations led to a deprivation of her right to gather evidence and witnesses on her behalf during a crucial time period following arrest.

Magistrate Wyrick testified he took into consideration Defendant's condition in deciding whether to impose a secured bond and he initially entered his reasons on his computer for imposing a secured bond into the "FINDINGS" section of Form AOC-CR-270. However, Magistrate Wyrick testified he accidently deleted his reasons listed on Form AOC-CR-270 and they were replaced with the text and finding of "BLOOD TEST." Based upon the magistrate's testimony, the trial court found:

> 38. Magistrate Wyrick noted by writing "Blood Test" on [AOC-CR-270] that he found by clear[,] cogent[,] and convincing evidence that the defendant's physical or mental faculties were impaired and that she was a danger to herself, others or property if released.
>
> 39. Magistrate Wyrick ordered that the defendant be held until her physical and mental faculties were no longer impaired to the extent she presented a danger to herself, others or property *or released to a sober responsible adult*. (SE# 5) [Emphasis supplied]

> 40. Magistrate Wyrick on the charges of No Operator's License, Simple Possession of Schedule II Controlled Substance and Simple Possession of Schedule IV Controlled Substance set a $1,000 secured bond for the defendant. (SE# 6)
>
> 41. Magistrate Wyrick testified that he considered the factors set forth in 15A-534(c) in setting the defendant's bond, but he could not recall any specific facts upon which he relied in setting the secured bond.
>
> 42. In addition, Magistrate Wyrick ordered the defendant be held until 7 am on 01/02/13 *unless released to a sober adult.* (SE# 6) [Emphasis supplied]

Based upon these findings of fact, which are supported by competent evidence, Defendant has failed to show she was denied access to witnesses, her right to have witnesses observe her condition, or her right to collect evidence. Defendant has not demonstrated "irreparable prejudice to the preparation of [her] case" by the magistrate's statutory violations and failures to provide her with a copy of Form AOC-CR-271 or to make additional factual findings to justify imposing a secured bond under N.C. Gen. Stat. § 15A-534.

Defendant was informed of her right to have witnesses observe her, had the means and was provided the opportunity to contact potential witnesses. Additionally, the magistrate's detention order required Defendant to remain in custody for a twelve-hour period or until released into the custody of "a sober, responsible adult." Defendant was released into the custody of a sober acquaintance after spending only two hours and fifty-three minutes in jail, from 9:31 p.m. 1 January 2013 until 12:24 a.m. 2 January 2013.

[3] Defendant also argues she was *per se* prejudiced by the magistrate's statutory violations, pursuant to *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971). In *Hill*, the defendant was involved in a motor vehicle accident. *Id.* at 549, 178 S.E.2d at 463. After coming upon the scene of the accident, a police officer arrested the defendant for drunken driving after observing factors tending to indicate the defendant was appreciably impaired. *Id.* After his arrest, the defendant was taken to jail and administered a breathalyzer test. *Id.*, 178 S.E.2d at 464. Following the breathalyzer test, the evidence tended to show:

> (1) that defendant was not 'permitted' to telephone his attorney until after the breathalyzer testing and photographic

> procedures were completed and the warrant was served; (2) that he called Mr. Graham, his attorney and brother-in-law, who came to the jail; (3) that Mr. Graham's request to see his client and relative was peremptorily and categorically denied; and (4) that from the time defendant was arrested about 11:00 p.m. until he was released about 7:00 a.m. the following morning only law enforcement officers had seen or had access to him.

Id. at 553, 178 S.E.2d at 466. The evidence also tended to show the defendant was only permitted one phone call. *Id.* at 550, 178 S.E.2d at 464. The Supreme Court of North Carolina held the denial of the defendant's statutory and constitutional right of access to his counsel was *per se* prejudicial and stated:

> Before we could say that defendant was not prejudiced by the refusal of the jailer to permit his attorney to see him we would have to assume both the infallibility and credibility of the State's witnesses as well as the certitude of their tests. Even if the assumption be true in this case, it will not always be so. However, the rule we now formulate will be uniformly applicable hereafter. It may well be that here 'the criminal is to go free because the constable blundered.' Notwithstanding, when an officer's blunder deprives a defendant of his only opportunity to obtain evidence which might prove his innocence, the State will not be heard to say that such evidence did not exist.

Id. at 555, 178 S.E.2d at 467 (emphasis supplied).

In contrast to the facts in *Hill*, no evidence in the record suggests the State took affirmative steps to deprive Defendant of any access to potential witnesses or an attorney, such as by preventing them from talking to Defendant or entering the jail to observe her. *See id.*

Unlike the defendant in *Hill*, Defendant was told of her right to have observers present, was not limited to one phone call following her arrest, was allowed and did make numerous calls to multiple individuals and was released to a sober adult within less than three hours. Additionally, the Supreme Court later acknowledged in *Knoll* that the *per se* prejudice rule stated in *Hill* is no longer applicable. *Knoll*, 322 N.C. at 545, 369 S.E.2d at 564 ("Because of the change in North Carolina's driving while intoxicated laws, denial of access is no longer inherently prejudicial to a defendant's ability to gather evidence in support of his innocence in every driving while impaired case." (citation omitted)).

Defendant's arguments fail to demonstrate "irreparable prejudice to the preparation of defendant's case." *See Labinski*, 188 N.C. App. at 124, 654 S.E.2d at 742-43. Defendant does not raise any "good and sufficient cause" to support this Court's exercise of our discretion to grant her petition and issue the extraordinary writ of certiorari. *See Grundler*, 251 N.C. at 189, 111 S.E.2d at 9; *Roux*, 263 N.C. at 153, 139 S.E.2d at 192; *Ross*, 369 N.C. at 400, 794 S.E.2d at 293.

Defendant pled guilty to DWI in a plea bargain in exchange for the State's dismissal of two charges for possession of controlled substances for oxymorphone and Xanax, found upon her without a prescription when she was arrested for DWI. A defendant can plead guilty and reserve the right to challenge a motion to suppress pursuant to N.C. Gen. Stat. §§ 15A-979(b) (2017) and 15A-1444(e) (2017). Here, Defendant has never argued any evidence the State gathered in her case was obtained in violation of her constitutional or statutory rights and should be suppressed. Defendant attempts to appeal from an order denying her motion to dismiss entered prior to her guilty plea. This issue is not listed as one of the grounds for appeal of right set forth in N.C. Gen. Stat. § 15A-1444. Defendant has no statutory right to plead guilty, while preserving a right to appeal the denial of her motion to dismiss. *See* N.C. Gen. Stat. § 15A-1444.

As this Court has previously stated,

> We are reluctant to issue a writ of certiorari permitting direct review of issues that otherwise would not be reviewable on direct appeal because of a guilty plea. Permitting review by certiorari in these circumstances 'could damage the integrity of the plea bargaining process' by undermining the finality that the State secures when a defendant pleads guilty.

State v. Benton, __ N.C. App. __, 801 S.E.2d 396 (2017). Allowing certiorari under these facts could also jeopardize the adequate state procedure exemption to federal post-conviction relief. *See, e.g.*, *Brown v. Lee*, 319 F.3d 162, 169 (4th Cir. 2003).

Defendant received the benefit of her plea bargain when the State agreed to dismiss the two charges for possession of controlled substances. Defendant pled guilty to DWI prior to the State Bureau of Investigation conducting a chemical analysis of her properly taken blood sample. Defendant stipulated "there's a factual basis for purposes of the DWI charge[,]" pursuant to her guilty plea. Defendant has not demonstrated any "good and sufficient cause" to justify exercising our discretion to grant her petition and issue a writ of certiorari to allow her

to challenge purported statutory violations surrounding a conviction to which she voluntarily pled guilty.

In addition to our analysis above, Defendant's petition also fails to assert any of the grounds for allowing her petition and issuing a writ of certiorari contained in Appellate Rule 21 for us to exercise our discretion to grant Defendant's petition under that Rule. *See Ledbetter*, __ N.C. at __, 814 S.E.2d at 43; N.C. R. App. P. 21(a)(1). Defendant failed to demonstrate any grounds for this Court to invoke Appellate Rule 2. *See id.*; *see also* N.C. R. App. P. 2.

III. Conclusion

Defendant has failed to demonstrate any "irreparable prejudice to the preparation of defendant's case," "good and sufficient cause" or any other grounds for purported statutory violations to support granting her petition for a writ of certiorari under the statute or our appellate rules. In the exercise of our discretion, Defendant's petition for writ of certiorari is denied. Defendant's purported appeal is dismissed. *It is so ordered.*

PETITION DENIED AND APPEAL DISMISSED.

Judge DIETZ concurs.

Judge ARROWOOD concurs in the result.

STATE OF NORTH CAROLINA
v.
JAMES LEE MURPHY

No. COA17-1287

Filed 21 August 2018

1. Damages and Remedies—restitution—not arising from convictions—statutory authority

Where the State dismissed several breaking and entering charges against defendant in return for defendant's guilty pleas and stipulation to restitution, the trial court lacked statutory authority to order defendant to pay restitution to the alleged victims of the offenses in the dismissed indictments, because restitution may be ordered only to remedy losses arising out of offenses for which a defendant is convicted.

2. Damages and Remedies—restitution—invalidly ordered restitution—remedy

Where portions of an order of restitution were invalid (because the losses arose from dismissed charges), the proper remedy was to vacate the restitution order and remand for resentencing on restitution. Defendant's stipulation to restitution as part of his plea agreement was not an agreement to pay restitution—but merely an admission that there was a factual basis for restitution—so the invalidly ordered restitution was not an essential or fundamental term of the agreement.

Appeal by defendant from judgments entered 21 March 2017 by Judge Cy A. Grant in Pitt County Superior Court. Heard in the Court of Appeals 16 May 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Kacy L. Hunt, for the State.

The Law Office of Sterling Rozear, PLLC, by Sterling Rozear, for defendant.

ELMORE, Judge.

Defendant James Lee Murphy appeals criminal judgments entered upon his guilty pleas to seven counts of felony breaking and entering into seven different residences on different dates, and a civil judgment ordering he pay $23,113.00 in restitution to fourteen alleged victims identified in the State's restitution worksheet. In return for defendant's pleas and his stipulation to restitution as provided in the State's restitution worksheet, the State dismissed thirteen indictments against him, three of which contained the only charges linked to losses suffered by four of the fourteen alleged victims to whom the trial court ordered he pay restitution.

On appeal, defendant challenges the factual basis for two of his seven pleas and the validity of the trial court's restitution order. Despite defendant's failure to give notice of appeal at sentencing, N.C. R. App. P. 4(a), we allow his petition to issue a writ of *certiorari* solely to review the restitution order and address his arguments that (1) the trial court lacked authority to order restitution as to the four victims not affected by the seven breaking-and-entering counts to which he pled guilty; and (2) since the invalidly ordered restitution was part of the plea agreement,

his entire plea agreement must be set aside and the case remanded for new proceedings.

Because a trial court is only statutorily authorized to order restitution for losses attributable to a defendant's perpetration of crimes for which he or she is convicted, we hold the trial court invalidly ordered defendant to pay restitution for pecuniary losses arising from his alleged perpetration of the charges in the three indictments the State dismissed pursuant to the plea agreement. Additionally, although defendant stipulated to this invalidly ordered restitution in the plea agreement, a stipulation to restitution is not an express agreement to pay restitution, and we therefore hold that defendant's entire plea agreement need not be set aside. Accordingly, we vacate the restitution order and remand for resentencing only on the issue of restitution.

I. Background

From 8 August 2016 to 27 February 2017, defendant was indicted for multiple breaking-and-entering and related larceny charges, including offenses defendant allegedly perpetrated at ten different residences on different dates. On 21 March 2017, defendant entered in a plea agreement in which he pled guilty to seven felony breaking-and-entering charges at seven of the ten residences and stipulated to restitution as provided in the State's restitution worksheet; in return, the State dismissed the remaining indictments, including the offenses defendant allegedly perpetrated at the other three residences. In the transcript of plea, the plea arrangement provides that "[defendant] will plea to 7 counts of breaking and/or entering in lieu of the charges listed on the back of this transcript[,]" and defendant checked the following box: "The defendant stipulates to restitution to the party(ies) in the amounts set out on 'Restitution Worksheet, Notice And Order (Initial Sentencing)' (AOC-CR-611)." The restitution worksheet listed fourteen alleged victims—ten of whom were linked to the seven residences defendant pled guilty to breaking into and entering; four of whom were linked to the three residences defendant was charged with breaking into and entering, but the State dismissed pursuant to the plea agreement.

On 22 March 2017, the trial court at the plea hearing described the entire plea agreement as follows: "And the plea bargain is that upon your plea of guilty to these seven charges the State will dismiss all other charges[.]" After accepting defendant's guilty pleas, the trial court during sentencing ordered that

> [a]s a condition of work release and post-trial release, the Defendant is to make restitution to Shelton [sic] Dancy in

> the amount of $1706.00; Sheldon Jordan in the amount of $600.00; to Brice Wagoner, [sic] $600.00; to Ciandra [sic] Carmack, $1750.00; to Jeremy Williams and Tomika [sic] Brimmage [sic] . . . $4125.00; to Jasmine Howard, $997.00; Randy Robertson, $1050.50; to Carmen [sic] Keeter, $650.00; to Jose Martinez, $1400.00; to Natalie Day, $1735.00; to Shaquela [sic] Day, $1000.00; to Jordan Hostetler, $500.00.

That same day, the trial court entered a civil judgment ordering defendant to pay, *inter alia*, $23,113.00 in restitution; and criminal judgments imposing seven consecutive sentences of eight to nineteen months in prison, recommending work release, and recommending payment of the civil judgment as a condition of defendant's probation and to be taken from his work-release earnings. Seven days later, on 29 March, defendant returned to the trial court requesting a reconsideration of his sentence. When the trial court denied his request, defendant gave oral notice of appeal.

II. Errors Raised

On appeal, defendant asserts the trial court erred by (1) accepting his guilty pleas because two of the seven felony breaking-and-entering counts were factually unsupported, and (2) ordering he pay restitution to alleged victims of the charges dismissed by the State pursuant to the plea agreement.

III. Appellate Jurisdiction

Defendant concedes his right to appellate review is contingent upon this Court granting his petition for *certiorari* review because, as a guilty pleading defendant, he has no statutory right to challenge the factual basis for his pleas, *see* N.C. Gen. Stat. § 15A-1444(e) (2017), and, further, he violated our Appellate Procedure Rule 4(a) by failing to give oral notice of appeal at sentencing, *see* N.C. R. App. P. 4(a) (requiring in part "oral notice of appeal at trial"). Accordingly, defendant has petitioned this Court to issue a writ of *certiorari* in order to enable us to conduct a merits review of the two main issues he raises on appeal. See N.C. Gen. Stat. § 15A-1444(e) (permitting a defendant to "petition the appellate division for review [of whether his or her guilty pleas were supported by a sufficient factual basis] by writ of certiorari"); N.C. R. App. P. 21(a)(1) (granting this Court authority to issue a writ of *certiorari* "in appropriate circumstances" to review lower court judgments and orders, including but not limited to "when the right to prosecute an appeal has been lost by failure to take timely action[.] . . .").

After carefully considering the arguments presented in defendant's principal and reply briefs, and in his petition, we conclude there is no merit to his challenges to the factual bases of his pleas and thus decline to exercise our discretion to issue a writ of *certiorari* to address the first issue he presents. However, because we conclude defendant's challenges to the restitution order have merit, we exercise our discretion to issue a writ of *certiorari* in order to review the restitution order and address the merits of the second issue he presents. *See, e.g.*, *State v. Ross*, 369 N.C. 393, 400, 794 S.E.2d 289, 293 (2016) ("The decision concerning whether to issue a writ of certiorari is discretionary, and thus, the Court of Appeals may choose to grant such a writ to review some issues that are meritorious but not others for which a defendant has failed to show good or sufficient cause." (citing *Womble v. Moncure Mill & Gin Co.*, 194 N.C. 577, 579, 140 S.E. 230, 231 (1927)).

IV. Analysis

Defendant argues (1) trial courts have no authority to order restitution to victims of unconvicted crimes and, therefore, the trial court here invalidly ordered he pay restitution to alleged victims of the charges the State dismissed pursuant to the plea agreement; and (2) because this invalidly awarded restitution was part of the plea agreement, the proper remedy on appeal is to vacate his entire plea agreement and remand for new proceedings.

The State does not address the trial court's statutory authority to award restitution to victims of unconvicted crimes; rather, it argues, (1) because defendant in his plea agreement stipulated to restitution to those victims, the State was relieved of its burden to present evidence to support restitution and thus the restitution ordered should be affirmed; and (2) even if restitution was invalidly awarded to alleged victims of charges the State dismissed, the proper remedy here is not to set aside the entire plea agreement but to vacate the restitution order and remand for resentencing solely on the issue of restitution.

We agree with defendant that the restitution ordered to the four victims for pecuniary losses linked only to defendant's conduct in allegedly perpetrating the crimes charged in the three dismissed indictments was invalid. However, we agree with the State that the proper remedy is not to set aside the entire plea agreement but to vacate the restitution order and remand for resentencing solely on restitution.

A. Restitution

[1] N.C. Gen. Stat. § 15A-1340.34 governs "[r]estitution generally" and instructs that "[w]hen sentencing a defendant *convicted of a criminal offense*, the court shall determine whether the defendant shall be ordered to make restitution to any victim of the offense in question." *Id.* § 15A-1340.34(a) (2017) (emphasis added). Our guilty plea statute, while not using the term "convicted," provides that a "proposed plea arrangement may include a provision for the defendant to make restitution . . . to . . . aggrieved . . . parties for the . . . loss caused by the . . . *offenses committed* by the defendant." N.C. Gen. Stat. § 15A-1021(c) (2017) (emphasis added). Similarly, our statute governing conditions of probation provides that, "[a]s a condition of probation, a defendant may be required to make restitution . . . to . . . aggrieved . . . parties . . . for the . . . loss caused by the defendant *arising out of the* . . . *offenses committed* by the defendant." N.C. Gen. Stat. § 15A-1343(d) (2017) (emphasis added).

Thus, the restitution authorized under our General Statutes requires a direct nexus between a convicted offense and the loss being remedied. *Compare State v. Billinger*, 213 N.C. App. 249, 258, 714 S.E.2d 201, 208 (2011) ("As we have vacated defendant's conspiracy conviction . . . , there is no conspiracy conviction to which the restitution order may be attached. Consequently, we must also vacate the restitution award . . . ."); *with State v. Dula*, 67 N.C. App. 748, 751, 313 S.E.2d 899, 901 (1984) (upholding restitution ordered for stolen goods to a victim of an alleged breaking-and-entering and related larceny, despite a jury acquittal on the larceny charge, since the jury convicted the defendant of the related breaking-and-entering charge, and restitution was ordered as a condition of probation), *aff'd per curiam*, 312 N.C. 80, 80, 320 S.E.2d 405, 406 (1984) ("The Court of Appeals correctly held that the trial court did not commit error when it required the defendant to make restitution for the loss and damage caused by the defendant 'arising out of' the offense committed by her as provided by G.S. 15A-1343(d)."). Put another way, restitution is securely tied to the losses attributable to the offenses of conviction. *See, e.g.*, *State v. Valladares*, 182 N.C. App. 525, 526, 642 S.E.2d 489, 491 (2007) ("It is well settled that 'for an order of restitution to be valid, it must be related to the criminal act for which defendant was convicted, else the provision may run afoul of the constitutional provision prohibiting imprisonment for debt.' " (quoting *State v. Froneberger*, 81 N.C. App. 398, 404, 344 S.E.2d 344, 348 (1986)).

Here, the trial court entered a civil judgment requiring defendant to pay $23,113.00 in restitution in relevant part as follows: (1) $1,050.50 to Randy Robertson for 15 CRS 54923, which included one felony

breaking-and-entering count and one larceny-after-breaking-and-entering count, arising from offenses defendant allegedly perpetrated on 26 May 2015 at 341 Ormond Street in Ayden; (2) $650.00 to Camryn Keeter for 16 CRS 52073, which included one breaking-and-entering-with-the-intent-to-commit-a-larceny count, arising from an offense defendant allegedly perpetrated on 15 March 2016 at 110 South Harding Street in Greenville; (3) $1,400.00 to Jose Martinez for 16 CRS 52074, which included one breaking-and-entering-with-the-intent-to-commit-a-larceny count, arising from an offense defendant allegedly perpetrated on 18 February 2016 at 1088 Cheyenee Court in Greenville; and (4) $500.00 to Jordan Hostetler for an unidentified offense. Pursuant to the plea agreement, defendant pled guilty to seven counts of felony breaking and entering into seven other residences on different dates, and the State dropped, *inter alia*, the indictments in 15 CRS 54923, 16 CRS 52073, and 16 CRS 52074. These indictments contained the only charges against defendant for conduct attributable to the alleged losses suffered by Robertson, Keeter, Martinez, and Hostetler.[1]

As defendant was not convicted of any breaking-and-entering or related offenses as to the three residences of these four alleged victims, and as the alleged pecuniary losses suffered by these four alleged victims were unrelated to defendant's conduct in perpetrating the seven other break-ins to which he pled guilty, we hold the trial court lacked statutory authority to order restitution as to Robertson, Keeter, Martinez, and Hostetler. *See Billinger*, 213 N.C. App. at 258, 714 S.E.2d at 208.

We recognize that our Supreme Court in *Dula* affirmed in a *per curiam* opinion our holding that a trial court validly ordered restitution as a condition of the defendant's probation to a victim for the pecuniary loss of personal property allegedly stolen from her residence, although the jury acquitted the defendant of the larceny charge. *See Dula*, 312 N.C. at 80, 320 S.E.2d at 406 ("The Court of Appeals correctly held that the trial court did not commit error when it required the defendant to make restitution for the loss and damage caused by the defendant 'arising out of' the offense committed by her . . . ."). However, the jury in

1. While the first three alleged victims were identified in the indictments, both parties on appeal concede the State's restitution worksheet contains the only record reference to Hostetler. We note that worksheet indicates Hostetler shared the same physical address as Keeter, 110 South Harding Street, indicating Hostetler could only be an alleged victim of the same breaking-and-entering offense in 16 CRS 52073. We also note the arrest warrant alleges defendant stole $1,200.00 of personal property from Keeter, which appears to support the later restitution award of $650.00 to Keeter and $500.00 to Hostetler.

Dula convicted the defendant of a related breaking-and-entering-with-the-intent-to-commit-a-larceny charge she allegedly perpetrated at the same residence and on the same date. *Dula*, 67 N.C. App. at 751, 313 S.E.2d at 901. Thus, the restitution ordered as a condition of the defendant's probation in *Dula* was not solely supported by the acquitted larceny charge but "ar[ose] out of" the breaking-and-entering conviction.

Here, contrarily, the charges in the three dismissed indictments were wholly unrelated to defendant's conduct in perpetrating the seven breaking-and-entering charges to which he pled guilty, offenses that occurred at seven different residences on seven different dates. Therefore, unlike the restitution ordered as to the victims of the breaking-and-entering charges to which defendant pled guilty, the restitution ordered as to the alleged victims of the charges that were dismissed did not "aris[e] out of" any offense for which defendant was convicted.

As to the State's argument that the restitution ordered should nonetheless be upheld based on defendant's stipulation in the plea arrangement to restitution as to these four alleged victims, we conclude that parties to a plea agreement cannot by stipulation increase the statutory powers of a sentencing judge to authorize restitution beyond that allowed under our General Statutes.

Accordingly, because the trial court lacked statutory authority to order defendant pay restitution to alleged victims of unconvicted offenses for losses not attributable to his conduct in perpetrating the offenses to which he pled guilty, its order of restitution as to Robertson, Keeter, Martinez, and Hostetler was invalid. Having reached this conclusion, we next turn to the appropriate appellate remedy.

B. Plea Agreement

[2] Defendant asserts that because he agreed to pay this invalid restitution as part of the plea deal, the appropriate remedy is to set aside his entire plea agreement and remand the case for new proceedings. The State replies that the appropriate remedy, as ordinarily applied when restitution is invalidly ordered, is to vacate the restitution order and remand the case solely for resentencing on restitution. *See, e.g.*, *State v. Hunt*, ___ N.C. App. ___, ___, 792 S.E.2d 552, 563 (2016). We agree with the State.

To support his request to set aside the entire plea agreement, defendant relies on *State v. Rico*, 218 N.C. App. 109, 720 S.E.2d 801 (Steelman, J., dissenting), *rev'd for reasons stated in dissent*, 366 N.C. 327, 734 S.E.2d 571 (2012) (*per curiam*). In *Rico*, the defendant was charged

with murder and entered into a plea agreement in which he pled guilty to voluntary manslaughter. *Id.* at 110, 720 S.E.2d at 802. As part of the plea agreement, the defendant admitted to the existence of an aggravating factor and agreed to a sentence in the aggravating range, *id.* at 111, 720 S.E.2d at 802, which both the majority panel and dissenting judge agreed the sentencing judge was statutorily unauthorized to impose, *id.* at 118–19, 720 S.E.2d at 807.

As to the appropriate remedy, the majority panel reasoned that because the defendant "fully complied with the terms of his plea agreement, and the risk of any mistake in a plea agreement must be borne by the State[,]" "the State remains bound by the plea agreement[.]" *Id.* at 119, 720 S.E.2d at 807. Therefore, the majority decreed, the "defendant should be resentenced upon his guilty plea to voluntary manslaughter." *Id.* The dissenting judge reasoned that "essential and fundamental terms of the plea agreement were unfulfillable[,]" and the defendant "cannot repudiate in part without repudiating the whole[.]" *Id.* at 122, 720 S.E.2d at 809. Thus, the dissenting judge opined that "[t]he entire plea agreement must be set aside, and this case remanded . . . for disposition on the original charge of murder." *Id.* On appeal, our Supreme Court in a *per curiam* opinion reversed the majority's decision as to the appropriate remedy and adopted the dissenting judge's disposition of setting aside the entire plea agreement. *Rico*, 366 N.C. at 327, 734 S.E.2d at 571. *Rico* is distinguishable because the payment of restitution was not an "essential or fundamental term[ ]" of defendant's plea agreement.

Here, in the transcript of plea, the arrangement provided that "[defendant] will plea to 7 counts of breaking and/or entering in lieu of the charges listed on the back of this transcript[,]" and defendant checked the following box in that same section: "The defendant stipulates to restitution to the party(ies) in the amounts set out on 'Restitution Worksheet, Notice And Order (Initial Sentencing)' (AOC-CR-611)."

At the plea hearing, the following relevant colloquy occurred:

> THE COURT: Now, you are pleading guilty to seven charges of breaking and/or entering; correct?
>
> THE DEFENDANT: Yes, sir.
>
> . . . .
>
> THE COURT: And you agree that the plea of guilty is part of a plea bargain; correct?
>
> THE DEFENDANT: Yes, sir.

THE COURT: *And the plea bargain is that upon your plea of guilty to these seven charges the State will dismiss all other charges -*

THE DEFENDANT: Yes, sir.

THE COURT: - *in Superior and District Court?*

THE DEFENDANT: Yes, sir.

THE COURT: Do you now accept this arrangement?

THE DEFENDANT: Yes, sir.

(Emphasis added.) Following its acceptance of defendant's guilty pleas, the trial court recommended work release and ordered "as a condition of work release and post-trial release" that defendant pay the particular orders of restitution.

As reflected, despite defendant's stipulation to restitution as provided in the State's restitution worksheet, defendant never agreed to pay restitution as part of the plea agreement. Rather, as described in the transcript of plea and explained during the plea colloquy, the essential and fundamental terms of the plea agreement were that defendant would plead to seven counts of felony breaking-and-entering, and the State would drop the remaining charges. A stipulation to restitution as part of a plea agreement merely relieves the State of its burden to present a supportive factual basis, *cf. State v. Blount*, 209 N.C. App. 340, 348, 703 S.E.2d 921, 927 (2011) ("A restitution worksheet, unsupported by testimony, documentation, or *stipulation*, 'is insufficient to support an order of restitution.' " (emphasis added) (quoting *State v. Mauer*, 202 N.C. App. 546, 552, 688 S.E.2d 774, 778 (2010)); it is not an express agreement to pay that particular restitution as a condition of the plea agreement. As defendant never agreed to pay restitution as part of the plea agreement, the invalidly ordered restitution was not an "essential or fundamental" term of the deal. Accordingly, we hold the proper remedy here is not to set aside defendant's entire plea agreement but to vacate the restitution order and remand for resentencing solely on the issue of restitution.

V. Conclusion

The trial court's restitution order in this case was unauthorized. Defendant pled guilty only to breaking and entering the seven residences of Sheldon Jordan, Shakeela and Natalie Day, Sheldon Dancy and Natasha Williams, Jeremy Williams and Tonica Brimage, Ceondra Carmack, Jasmine Howard, and Brice Wagner. Because the restitution order encompassed losses stemming from breaking-and-entering and

related larceny offenses defendant allegedly perpetrated at three different homes on different dates, the trial court lacked statutory authority to order defendant pay restitution to the four residents of those three homes—Randy Robertson, Jose Martinez, Camryn Keeter, and Jordan Hostetler. Additionally, although defendant stipulated in the plea agreement to restitution to these four alleged victims, he never expressly agreed to pay restitution as part of that agreement. As the invalidly ordered restitution was not an essential or fundamental term of the plea agreement, the entire plea agreement need not be set aside. Accordingly, we vacate the trial court's restitution order and remand for resentencing solely on the issue of restitution.

VACATED AND REMANDED.

Judges HUNTER, JR. and ZACHARY concur.

TOWN OF LITTLETON, PLAINTIFF
v.
LAYNE HEAVY CIVIL, INC. F/D/B/A REYNOLDS, INC.; LAYNE INLINER, LLC, F/D/B/A REYNOLDS INLINER, LLC; AND MACK GAY ASSOCIATES, P.A., DEFENDANTS

No. COA17-1137

Filed 21 August 2018

Statutes of Limitation and Repose—sewer rehabilitation project—nullum tempus doctrine—proprietary versus governmental function

In a dispute between a town and contractors over a sewer rehabilitation project, the trial court did not err in granting summary judgment in favor of defendant contractors on the basis that all of the claims, including negligence, breach of contract, and unfair and deceptive trade practices, were barred by the relevant statutes of limitations since the town waited over four years to bring suit. Since the operation and maintenance of a sewer system is a proprietary function, and not a governmental one, the doctrine of nullum tempus did not operate to exempt the municipality from the running of time limitations.

Appeal by plaintiff from orders entered 20 June and 5 July 2017 by Judge Beecher R. Gray in Halifax County Superior Court. Heard in the Court of Appeals 7 March 2018.

Hedrick Gardner Kincheloe & Garofalo LLP, by Joshua D. Neighbors and Patricia P. Shields, and Tharrington Smith, LLP, by Rod Malone and Kristopher B. Gardner, for plaintiff-appellant.

Ellis & Winters LLP, by Stephen D. Feldman, Leslie C. Packer, Steven A. Scoggan, and Alexander M. Pearce, for defendants-appellees Layne Heavy Civil, Inc. and Layne Inliner, LLC.

Young Moore and Henderson, P.A., by Walter E. Brock, Jr. and Andrew P. Flynt, for defendant-appellee Mack Gay Associates, P.A.

BERGER, Judge.

The Town of Littleton ("Plaintiff") appeals two orders granting summary judgment in favor of Layne Heavy Civil, Inc. and Layne Inliner, LLC ("Defendant Layne") and Mack Gay Associates, P.A. ("Defendant Mack Gay") in a dispute over a sewer rehabilitation project. The trial court ruled in favor of all Defendants because the applicable statutes of limitation barred each of Plaintiff's claims. Plaintiff argues that the trial court erred because the sewer project was a governmental function to which statutes of limitation would not apply under the doctrine of *nullum tempus*. However, a municipality's operation and maintenance of a sewer system is a proprietary function, not governmental, and thus, the doctrine of *nullum tempus* is inapplicable. We therefore affirm the orders of the trial court.

Factual and Procedural Background

In 2004, Plaintiff received grant money from the North Carolina Clean Water Management Trust Fund ("the Fund") to rehabilitate its sewer system. One purpose of the Fund is to "help finance projects that enhance or restore degraded surface waters; protect and conserve surface waters, including drinking supplies, and contribute toward a network of riparian buffers and greenways for environmental, educational, and recreational benefits." N.C. Gen. Stat. § 143B-135.230 (2017). Plaintiff contracted with Defendant Mack Gay to provide assistance in applying for grant funding, design the rehabilitation project, and perform construction administration and observation services.

The main scope of the project was to eliminate storm water infiltration into Plaintiff's sanitary sewer collection system, which would reduce costs and prevent untreated wastewater spills. Defendant Mack Gay provided construction plans in July 2005. The scope of proposed

work included: rehabilitation or replacement of existing sewer lines, manholes, and an existing pump station; construction of new pump stations; installation of a generator at a wastewater treatment plant; and other miscellaneous repairs.

Plaintiff contracted with Defendant Layne for the rehabilitation and repair work that began in December 2005 and was completed by October 2008. Beginning in April 2010, residents informed Plaintiff of serious deficiencies with the sewer rehabilitation. Inspections in October 2010 and March 2011 confirmed significant issues with the project. Recognizing the seriousness of the deficiencies, on November 7, 2011, Plaintiff's town commissioners and town attorney discussed holding Defendants accountable for these deficiencies. The town attorney was authorized to take actions to ensure the issues were corrected. Plaintiff's town commissioners formally authorized the town attorney to file suit on January 3, 2013.

However, three years passed before Plaintiff filed this lawsuit against Defendants on January 8, 2016. Plaintiff's unverified complaint alleged negligence, fraud, negligent misrepresentation, breach of contract, breach of warranty, professional malpractice, trespass to chattels, conversion, and unfair and deceptive trade practices. Defendants moved to dismiss all claims pursuant to Rule 12 of the North Carolina Rules of Civil Procedure, and the trial court dismissed the trespass and conversion claims, as well as the claim of unfair and deceptive trade practices against Defendant Mack Gay.

On May 8 and May 11, 2016, Defendants filed motions for summary judgment on all remaining claims by Plaintiff, alleging that all were barred by the applicable statutes of limitation. Plaintiff filed neither responsive pleadings nor additional evidence. Since there were no disputes as to the material facts, the trial court granted summary judgment in favor of Defendant Layne in an order entered June 20, 2017 and Defendant Mack Gay in an order entered July 5, 2017. Both of the trial court's orders granted summary judgment against Plaintiff because of the expiration of the applicable statutes of limitation. Plaintiff timely appealed these orders.

Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C.

569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

Analysis

Plaintiff argues that the trial court erred in granting summary judgment in favor of Defendants due to the expiration of statutes of limitation. Plaintiff asserts that its claims are not barred by the statutes of limitation because the project was a governmental function and was therefore protected by the doctrine of *nullum tempus*. We disagree.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2017). Further,

> [w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response . . . must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

N.C. Gen. Stat. § 1A-1, Rule 56(e); *accord Asheville Sports Props., LLC v. City of Asheville*, 199 N.C. App. 341, 344, 683 S.E.2d 217, 219 (2009).

Causes of action based on negligence, fraud, negligent misrepresentation, breach of contract, breach of warranty, and professional malpractice are each subject to a three-year statute of limitation. N.C. Gen. Stat. §§ 1-15(c), -52 (2017). A cause of action based on unfair and deceptive trade practices is subject to a four-year statute of limitation. N.C. Gen. Stat. § 75-16.2 (2017). Plaintiff filed its suit more than four years after all claims arose. Its suit would therefore be barred unless the doctrine of *nullum tempus* applies.

Our Supreme Court has described the doctrine of *nullum tempus occurrit regi* by stating that:

> *nullum tempus* survives in North Carolina and applies to exempt the State and its political subdivisions from the running of time limitations unless the pertinent statute expressly includes the State. . . . *Nullum tempus* does not, however, apply in every case in which the State is a party. If the function at issue is governmental, time limitations

> do not run against the State or its subdivisions unless the statute at issue expressly *includes* the State. If the function is proprietary, time limitations do run against the State and its subdivisions unless the statute at issue expressly *excludes* the State.

Rowan Cty. Bd. of Educ. v. U.S. Gypsum Co., 332 N.C. 1, 8-9, 418 S.E.2d 648, 653-54 (1992).

As in sovereign immunity cases, whether the subject matter of the suit is governmental or proprietary will determine whether the courts must apply *nullum tempus* or the appropriate statutes of limitation. *See id.* Generally, "[i]f the undertaking of the municipality is one in which only a governmental agency could engage, it is governmental in nature. It is proprietary and 'private' when any corporation, individual, or group of individuals could do the same thing." *Britt v. City of Wilmington*, 236 N.C. 446, 451, 73 S.E.2d 289, 293 (1952). "The law is clear in holding that the operation and maintenance of a sewer system is a proprietary function where the municipality sets rates and charges fees for the maintenance of sewer lines." *Harrison v. City of Sanford*, 177 N.C. App. 116, 121, 627 S.E.2d 672, 676, *disc. review denied*, ___ N.C. ___, 639 S.E.2d 649 (2006); *see also Union Cty. v. Town of Marshville*, ___ N.C. App. ___, ___, 804 S.E.2d 801, 805 (2017) (municipality not entitled to immunity because operation and maintenance of sewer system is proprietary in nature), *disc. review denied* ___ N.C. ___, 814 S.E.2d 101 (2018); *Bostic Packaging, Inc. v. City of Monroe*, 149 N.C. App. 825, 829, 562 S.E.2d 75, 79, *disc. review denied*, 355 N.C. 747, 565 S.E.2d 192 (2002) (municipality not immune from tort liability in the operation and maintenance of a sewer system).

Plaintiff contends that the facts of this case compel us to follow *McCombs v. City of Asheboro*, 6 N.C. App. 234, 170 S.E.2d 169 (1969). Plaintiff interprets *McCombs* as holding that the construction of a sewer system is a governmental function, thus entitling the City of Asheboro to governmental immunity, and, by analogy, entitles Plaintiff to the protection of *nullum tempus*. However, Plaintiff's reliance on *McCombs* is misguided for two reasons. First, *McCombs* refrained from deciding whether the City of Asheboro's construction of a new sewer line was a governmental or proprietary function. *See id.* at 242, 170 S.E.2d at 175 ("Conceding, *arguendo*, that [Plaintiff's allegation that the Defendant was engaged in a proprietary function in the construction of a sewer line] is sufficient to save the complaint from demurrer on the ground of governmental immunity, we are of the opinion that the complaint must fail [because there are no facts alleged constituting negligence of the

defendant]."). Second, *McCombs* is distinguishable from the case *sub judice* because the defendant in *McCombs* was constructing new sewer lines, *id*. at 237, 170 S.E.2d at 172, whereas here, Plaintiff was maintaining sewer system assets in need of repair.

The final report expressly acknowledged the purpose of the project was to rehabilitate more than 35,000 linear feet of sewer collection lines and nearly 120 manhole covers; replace or build multiple pump stations; and conduct "[m]iscellaneous repairs to short line segments." Defendant Mack Gay's final report on the project states that the main purpose of the project was to reduce inflow and infiltration of storm water into the sewer system. The evidence Defendants submitted in support of its summary judgment motions established that one of the purposes of the project was to reduce costs of running the sewer system. This evidence tended to show that the project would eliminate expenses incurred per gallon of inflow and infiltration, which were estimated to cost $0.09 per gallon per year. Additionally, the project would also eliminate Plaintiff's potential liability for sewage spills resulting from rainwater penetrating the system, which, under state law, could have cost up to $25,000.00 per day.

The record before us shows that there is no genuine issue as to any material fact and Defendants were entitled to a judgment as a matter of law. The evidence describes a maintenance project on a city-operated sewer system to reduce the infiltration and inflow of storm water. This maintenance would reduce costs to Plaintiff in its running of the sewer system and would reduce any waste water spills. Because the operation and maintenance of a sewer system is a proprietary function, Plaintiff's maintenance project was a proprietary function. The doctrine of *nullum tempus* does not apply to Plaintiff's claims. Therefore, the trial court did not err in granting summary judgment in favor of Defendants.

Conclusion

Defendants properly pleaded the applicable statutes of limitation as a defense against each of Plaintiff's claims. The undisputed facts describe a sewer system maintenance project, which is a proprietary function. Thus, *nullum tempus* does not apply to Plaintiff's claims, and the statutes of limitation control. The trial court did not err in granting summary judgment to Defendants because of the expiration of the applicable statutes of limitation. The orders of the trial court are affirmed.

AFFIRMED.

Judges ELMORE and INMAN concur.

WATSON v. WATSON

[261 N.C. App. 94 (2018)]

DWIGHT WATSON, PLAINTIFF
v.
GURTHA WATSON, DEFENDANT

No. COA17-899

Filed 21 August 2018

1. Divorce—equitable distribution—classification—marital versus separate property—house

In a equitable distribution action, the trial court erred in distributing the parties' home to the wife after finding that the home was separate property. Since only marital property may be distributed in equitable distribution, the trial court was instructed on remand to classify and value the home and any marital or separate interests in the home and then distribute any marital interest.

2. Divorce—equitable distribution—valuation—car

In an equitable distribution action, the trial court erred in valuing a Cadillac El Dorado at $10,000 as of the date of separation where there was no evidence to support that valuation as the fair market value on the date of separation, and where the only evidence appeared to be that the car's value was $1,880 on the relevant date.

3. Divorce—equitable distribution—valuation—home equity—401(k)

In an equitable distribution action, the trial court's determination that an unequal distribution was equitable was not based on a proper classification and valuation of assets, including a home equity line of credit (HELOC) taken out by the husband and the husband's 401(k). The trial court classified the HELOC as a separate debt but then stated there was no evidence of its value despite not needing to distribute it; conversely, the trial court classified the 401(k) as marital debt but did not value it, as it would need to do before distribution. Finally, where the trial court erroneously found the parties separated in 2007, and not 2009, its determination that there was no evidence of the value of the 401(k) at the date of separation despite a letter from the plan administrator dated 2009 with the account's value may or may have been prejudicial, depending on whether the court chose not to rely on the letter for a reason other than the misapprehension about the correct date of separation. There is no way to know if an unequal distribution of the marital estate is equitable if there is no finding on the net value of the entire marital estate.

4. Divorce—equitable distribution—marital property—unequal distribution—liquid assets

In an equitable distribution action that was remanded for errors in classification and valuation of the parties' property, the trial court also abused its discretion in ordering an unequal distribution of marital property using the distributional factors in N.C.G.S. § 50-20(c) without a proper valuation of marital assets and upon a misunderstanding of the difference between liquid and nonliquid assets.

Appeal by plaintiff from order entered 28 February 2017 by Judge Michael J. Denning in District Court, Wake County. Heard in the Court of Appeals 25 January 2018.

Stephanie J. Brown for plaintiff-appellant.

Law Office of Tiffanie C. Meyers, by Tiffanie C. Meyers, for defendant-appellee.

STROUD, Judge.

Plaintiff Dwight Watson ("Husband") appeals from the trial court's equitable distribution order entered 28 February 2017. On appeal, plaintiff contends that the trial court erred in its classification, valuation, and distribution of the parties' property and in granting defendant Gertha[1] Watson ("Wife") an unequal distribution of marital property. Because the trial court's findings of fact do not support its conclusions of law and because the distributional factors found by the trial court are based upon some of those erroneous findings and conclusions, we reverse the equitable distribution order and remand for entry of a new equitable distribution order.

Background

Husband and Wife were married in November 1989. Although the trial court's equitable distribution order found the date of separation as October 2007, the parties stipulated in the final pretrial order to a date of separation of October 2009.[2] Husband filed a claim for divorce and equitable distribution on 2 April 2015. On 1 June 2015, Wife filed her

1. The trial court's order from which this appeal lies erroneously spells defendant-Wife's first name as "Gurtha."

2. Husband had initially believed the date of separation to be in 2007, but by the time the pretrial order was entered, the parties had agreed the correct year was 2009.

answer and counterclaims for post separation support, alimony, unequal distribution of marital property, and attorney's fees.

A hearing was held on 25 October 2016. Following the hearing, the trial court entered an equitable distribution order on 28 February 2017, which granted an unequal distribution in Wife's favor.[3] Husband timely appealed to this Court.

Analysis

Husband argues that the trial court erred in valuing and distributing a portion of the parties' marital property and in granting Wife an unequal distribution of the marital property. The parties had only a few assets and one debt in contention.[4] They had a home acquired a year before the marriage as joint tenants; the trial court found the marital home is "separate property held by a joint tenancy between the parties" but distributed the house to Wife and ordered Husband to execute any documents necessary to remove his name from the title and to pay the Home Equity Line of Credit ("HELOC"), which was secured by the marital home during the marriage, in a timely manner. The trial court also found that "[t]here is considerable equity in the marital residence which is marital property." The trial court found the HELOC debt is Husband's separate debt but found that it was "without any sufficient/or and competent evidence" of the remaining balance as of the date of separation to determine the payoff, although it made findings of the balance owed as of May 2015 of $42,689.58. Husband also had a 401K plan with his employer which the trial court classified as marital property but again, the trial court found "[t]here is no sufficient and competent evidence to value [Husband's] 401K" as of the date of separation. The other item in contention is a Cadillac El Dorado, which is marital property.

Husband challenges some findings of fact as unsupported by the evidence and some conclusions of law as unsupported by the facts. He also argues that the trial court abused its discretion in ordering an unequal distribution based upon its erroneous findings of fact.

> Our review of an equitable distribution order is limited to determining whether the trial court abused its discretion

3. The trial court denied Wife's claim for post-separation support and she has not cross-appealed the order, so the trial court's disposition of the post-separation support claim is not a subject of this appeal.

4. There were other items of personal property, including three other cars, and accounts listed in the pretrial order and addressed by the order, but Husband did not raise any argument on appeal about the trial court's treatment of those items.

> in distributing the parties' marital property. Accordingly, the findings of fact are conclusive if they are supported by any competent evidence from the record.
>
> However, even applying this generous standard of review, there are still requirements with which trial courts must comply. Under N.C.G.S. § 50–20(c), equitable distribution is a three-step process; the trial court must (1) determine what is marital and divisible property; (2) find the net value of the property; and (3) make an equitable distribution of that property.
>
> . . . .
>
> In fact, to enter a proper equitable distribution judgment, the trial court must specifically and particularly classify and value all assets and debts maintained by the parties at the date of separation. In determining the value of the property, the trial court must consider the property's market value, if any, less the amount of any encumbrance serving to offset or reduce the market value. Furthermore, in doing all these things the court must be specific and detailed enough to enable a reviewing court to determine what was done and its correctness.

Robinson v. Robinson, 210 N.C. App. 319, 322-23, 707 S.E.2d 785, 789 (2011) (citations, quotation marks, and brackets omitted).

> As to the actual distribution ordered by the trial court, when reviewing an equitable distribution order the standard of review is limited to a determination of whether there was a clear abuse of discretion. A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason.

Stovall v. Stovall, 205 N.C. App. 405, 407-08, 698 S.E.2d 680, 683 (2010) (citations, quotation marks, and brackets omitted).

I. Classification issues

Although Husband does not clearly identify an issue of classification of property, his arguments are largely based upon the trial court's findings and conclusions regarding classification. Neither the order nor Husband's brief separates the issues of classification, valuation, and distribution, but to review the issues, we must separate them. "[E]quitable distribution is a three-step process; the trial court must (1) determine

what is marital and divisible property; (2) find the net value of the property; and (3) make an equitable distribution of that property." *Robinson*, 210 N.C. App. at 323, 707 S.E.2d at 789 (citation, quotation marks, and brackets omitted).

[1] Husband argues the trial court erred by distributing the home to Wife and ordering him to remove his name from the deed and pay the HELOC, and his argument is primarily based upon the unequal distribution factors found by the trial court. But first, we must consider the classification of the home.

The order is internally contradictory on the classification of the home. The trial court found that the home is "separate property held by a joint tenancy between the parties." Separate property cannot be distributed in equitable distribution. *See Langston v. Richardson*, 206 N.C. App. 216, 220, 696 S.E.2d 867, 871 (2010) ("Under N.C. Gen. Stat. Sec. 50–20(c), only marital property is subject to distribution. The trial court must classify and identify property as marital or separate depending upon the proof presented to the trial court of the nature of the assets." (Citations and quotation marks omitted)). But then the trial court also found that "there is considerable equity in the marital residence which is marital property." But if there is marital equity in the home, the trial court must value the marital interest before distributing it. *See Turner v. Turner*, 64 N.C. App. 342, 345, 307 S.E.2d 407, 408-09 (1983) ("Under G.S. 50-20(c), equitable distribution applies only to the net value of marital property. This requires the trial court to first ascertain *what is marital property*, then to find the net value of that property, and finally to make a distribution based upon the equitable goals of the statute and the various factors specified therein."). And if the home itself is separate property, as the trial court found, it is not subject to distribution, yet the trial court distributed it to Wife, making essentially the same error as the court in *Turner*:

> If the house was purchased by plaintiff before the marriage, as the finding states, then it was error to subject the house, as such, to equitable distribution, since under G.S. 50-20(a)(2), property acquired by a spouse before marriage is "separate," rather than "marital," property. If, however, an equity in this property developed during the marriage because of improvements or payments contributed to by defendant, that equity (as distinguished from a mere increase in value of separate property, excluded by the statute) could be marital property, in our opinion, upon appropriate, supportable findings being made. And if

> not marital property, such equity, if it developed, would be a factor requiring consideration by the court, along with the other factors specified in the statute, before determining how much of the marital property each party is entitled to receive. . . . But the findings made do not support the division ordered.

Turner, 64 N.C. App. at 346, 307 S.E.2d at 409.

The trial court therefore erred by distributing the home, and on remand, the trial court should follow the process set forth in *Turner* to classify and value the home and any marital or separate interests in the home and to distribute any marital interest.

II. Valuation issues

A. Cadillac El Dorado

[2] Husband contends that the trial court's finding of fact valuing the 1995 Cadillac El Dorado at $10,000.00 is not supported by the evidence. We agree there is no evidence to support a finding of the value of the car as $10,000.00 as of the date of separation. The final pretrial order included schedules "setting out the parties' contentions as to the nature and values of the marital property." Wife valued the 1995 Cadillac at $1,880.00; Husband also valued the Cadillac at $1,880.00. Husband argues the parties "stiplulated" to the value so the court was bound by the stipulation. Wife counters that the parties did not *sign* the pretrial order and did not stipulate to values, although they both listed the same value. We agree that the pretrial order does not include a formal "stipulation" of value, but both parties alleged the same value. And the Pretrial Order did not purport to be a consent order which should be signed by the parties; it was entered based upon the pretrial conference held on 24 November 2015, and Wife claims no impropriety in the trial court's entry of the pretrial order.

The only evidence of the sum of $10,000.00 was Husband's testimony he had paid off a $10,000.00 balance of the loan on the vehicle with a portion of the proceeds from the HELOC, which he received in 2005, four years prior to the date of separation. But a loan payoff on a vehicle years prior to separation is not evidence of the fair market value of the vehicle on the date of separation. *See generally Walter v. Walter*, 149 N.C. App. 723, 733, 561 S.e.2d 571, 577 (2002) ("In an equitable distribution proceeding, the trial court is to determine the net fair market value of the property based on the evidence offered by the parties."). On remand, the court should value the car based upon the evidence of fair

market value *as of the date of separation*, and it appears that $1,880.00 is the only evidence of value as of the date of separation. *See generally Warren v. Warren*, 175 N.C. App. 509, 515, 623 S.E.2d 800, 804 (2006) ("In equitable distribution proceedings, marital property must be valued as of the date of the separation of the parties." (Citation and quotation marks omitted)).

B. Valuation of home equity, HELOC, and 401K plan

[3] Husband addresses this issue as part of his argument regarding unequal distribution factors, but as noted above, the issue originates in the classification and valuation, or lack thereof, of these items and the order's distribution of these assets. Equitable distribution is a three-step process: classification, valuation, and distribution. *See generally Robinson*, 210 N.C. App. at 323, 707 S.E.2d at 789. These three steps must be taken in order, so if the evidence is not sufficient to classify or value an item of property or debt, it cannot distributed. *See, e.g.*, *Estate of Nelson v. Nelson*, 179 N.C. App. 166, 168-69, 633 S.E.2d 124, 127 (2006) ("Failure to follow these steps carefully and in sequence may render the findings and conclusions inadequate, erroneous, or both."), *aff'd per curiam*, 361 N.C. 346, 643 S.E.2d 587 (2007).

Husband took out a HELOC secured by the marital home during the marriage, but the trial court found that the HELOC is Husband's *separate* debt based upon its findings regarding Husband's sole control over the HELOC and his use of the funds. The trial court was unable to value the outstanding debt as of the date of separation because there was not sufficient evidence of this value. But since the HELOC was classified as a *separate* debt, it need not be valued and cannot be distributed. *See, e.g.*, *Smith v. Smith*, 111 N.C. App. 460, 509-10, 433 S.E.2d 196, 226 (1993) (citations omitted) ("In determining an equitable distribution, the trial court must consider the debts of the parties. If the debt is a separate debt of one of the parties, then the court must consider it pursuant to N.C. Gen. Stat. § 50-20(c)(1). If the debt is a marital debt, that is, a debt incurred during the marriage for the joint benefit of the parties, then it must be valued and distributed." (Citations and quotation marks omitted)), *rev'd in part on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994). Classification of property and debt comes first, and only marital property or debt is subject to the next two steps of valuation and distribution. *See, e.g.*, *Wall v. Wall*, 140 N.C. App. 303, 307-08, 536 S.E.2d 647, 650 (2000) ("We continue to stress the importance of following the steps of first classifying, then valuing and distributing marital property. Each step is a prerequisite to the performance of the next, and failure to follow the prescribed order will result in a fatally flawed trial court

disposition. Only those assets and debts that are *classified* as marital property and *valued* are subject to *distribution* under the Equitable Distribution Act[.]" (Citation and quotation marks omitted)).

In this case, the trial court found there was not "sufficient and competent evidence to value [Husband's] 401K" as of the date of separation. Husband agrees with this finding, since it would be to his benefit, except that the trial court also used the 401K as a factor justifying the unequal distribution. Wife agrees the trial court did not have sufficient evidence to value the 401K, but she argues that it need not be valued to be a distributional factor. She is correct that the trial court need not value items used as distributional factors. *See Gum v. Gum*, 107 N.C. App. 734, 739, 421 S.E.2d 788, 791 (1992) ("The trial court is required to consider evidence of such contributions as a distributional factor according to N.C.G.S. § 50–20(c)(8). There is no language within § [50-20(c)] which would indicate that the trial court is required to place a monetary value on any distributional factor and we decline to impose such an unnecessary burden upon the trial court."). But *marital property* must be valued, *see*, *e.g.*, *Robinson*, 210 N.C. App. at 324, 707 S.E.2d. at 790 ("It is not enough that evidence can be found within the record which could support such classification; the court must actually classify all of the property and make a finding as to the value of all marital property."), and the trial court found that 401K plan was marital property but did not value it. If the 401K is not marital property, the trial court could have used it as a distributional factor without valuing it; but if it is marital property, it must first be valued as part of the marital estate. *See generally Gum*, 107 N.C. App. at 739, 421 S.E.2d at 791; *Robinson*, 210 N.C. App. at 324, 707 S.E.2d at 790. There is no way to know if the distribution of the marital estate is equal or unequal if there is no finding on the net value of the entire marital estate.

The trial court determines the credibility and weight of the evidence, *see*, *e.g.*, *Brackney v. Brackney*, 199 N.C. App. 375, 390, 682 S.E.2d 401, 410 (2009) ("[I]t is well-established . . . that when the trial court is the trier of fact, the court is empowered to assign weight to the evidence presented at the trial as it deems appropriate." (Citation, quotation marks, and brackets omitted)), and it is possible the trial court did not believe Husband's evidence regarding the value of the 401K. But we are concerned that the trial court's finding might be based upon the erroneous date of separation in the order. There was evidence, in the form of a letter from the 401K plan administrator, MassMutual Retirement Services Division, of the vested balance of the 401K as of 31 October 2009, the month of the parties' separation. Yet the trial court found the

parties separated in October 2007. The trial court would be correct there was no evidence of the value of the 401K in 2007 – but that is not the relevant year because the parties did not separate until 2009. Wife contends the finding of the year 2007 is merely a non-prejudicial clerical error. But considering the trial court's finding of a lack of evidence of the value of the 401K as of the date of separation, along with the evidence of a letter from the 401K plan administrator valuing the plan as of the date of separation, we cannot say for sure the date error is nonprejudicial. Again, it is possible the trial court did not rely upon the 401K plan administrator's letter for some other reason, and that would be within the trial court's discretion, but since we are vacating this order for other reasons, on remand, the trial court should clarify its findings regarding the valuation of the 401K as of the date of separation or its inability to value the plan.

III. Unequal Distribution of the Marital Property

[4] Husband contends that the trial court abused its discretion in granting Wife an unequal distribution because the primary findings of factors supporting the unequal distribution are legally and factually incorrect. Based upon the errors in classification and valuation discussed above, including the absence of a finding of the total value of the net marital estate, we must vacate the order and remand for entry of a new order, but we will address Husband's argument to avoid potential errors regarding the distributional factors on remand.

North Carolina General Statutes Section 50-20(c) sets out the factors the trial court should consider when determining whether an equal division is equitable. *See* N.C. Gen. Stat. § 50-20(c) (2017). "Where the trial court decides that an unequal distribution is equitable, the court must exercise its discretion to decide how much weight to give each factor supporting an unequal distribution. A single distributional factor may support an unequal division." *Mugno v. Mugno*, 205 N.C. App. 273, 278, 695 S.E.2d 495, 499 (2010) (citations omitted).

Here, the trial court determined that an unequal distribution of the marital and divisible property was equitable, and the court found these factors as justification for an unequal division:

> 35. N.C.G.S. § 50-20(c) -- Distributional Factors: That in considering whether an equal distribution would be equitable, the Court has considered all of the evidence presented by the parties relating to the statutory factors set out in Chapter 50-20(c) of the North Carolina General Statutes (as more particularly set out in the findings of fact contained in this judgment), and specifically including the following:

a. N.C.G.S. § 50-20(c)(1): At the time that the property division is to become effective, [Husband] is employed and will have received the majority of his 401K from Electro Switch, as well as having received the majority of, if not all of the benefit for the funds borrowed against the marital residence via the HELOC. [Wife] is receiving the marital residence.

b. N.C.G.S. § 50-20(c)(2): There is no obligation for support arising out of a prior marriage.

c. N.C.G.S. § 50-20(c)(3): The parties were married eighteen (18) years. Both parties are in good mental health. Both parties are limited in what they may do for employment although [Husband] continues to work.

. . . .

e. N.C.G.S. § 50-20(c)(5): [Husband] has obtained loans on his 401K, has received a substantial portion of it to date to the exclusion of [Wife], and will receive all that remains of it.

f. N.C.G.S. § 50-20(c)(6): Both parties contributed to the purchase of the Marital residence and its eventual pay off.

. . . .

i. N.C.G.S. § 50-20(c)(9): The 401K and the equity that remains in the residence are the largest Liquid assets the parties have. There is no sufficient and competent evidence to value [Husband's] 401K, the exact amount of principle (sic) remaining on the HELOC and as a result the exact amount of equity in the Marital Residence.

. . . .

36. An equal distribution of marital and divisible property is not equitable in this matter.

The court found that "[n]o evidence was presented" regarding any of the other factors in N.C. Gen. Stat. § 50-20(c).

The primary factor the trial court used to justify an unequal distribution was (i), but the trial court's finding "[t]he 401K and the equity

that remains in the residence are the largest Liquid assets the parties have" presents several problems. First, neither of these marital assets was valued, as discussed above. The second problem is either a serious clerical error or a misunderstanding of the meaning of the term "liquid." Black's Law Dictionary defines a liquid asset as "[a]n asset that is readily convertible to cash, such as a marketable security, a note, or an account receivable." Black's Law Dictionary (10th ed. 2014). In comparison, an illiquid asset is defined as "[a]n asset that is not readily convertible into cash, usu. because of (1) the lack of demand, (2) the absence of an established market, or (3) the substantial cost or time required for liquidation (*such as real property, even when it is desirable*)." *Illiquid asset*, Black's Law Dictionary (10th ed. 2014) (emphasis added). A 401K plan is not liquid since it is not readily accessible and any withdrawals prior to retirement incur substantial taxes and penalties. Equity in a home is not liquid because the home must be sold to get access to the equity. *See e.g.*, *Robertson v. Robertson*, 167 N.C. App. 567, 571, 605 S.E.2d 667, 669-70 (2004) ("Although the trial court found defendant could liquidate the above assets to pay the $52,100.07 distributive award, the only liquid assets readily available to pay the award were two bank accounts totaling $5,929.38. Wife's other assets included stock in PSI valued at $37,336.00, the unencumbered one-half acre lot valued at $8,920.00, and the personal property valued at $13,829.68. With the exception of the pension plan, which the trial court found would be difficult to liquidate and might cause unfavorable tax consequences, the trial court failed to make findings concerning the difficulty and possible financial and tax consequences of borrowing money against or liquidating the PSI stock, the one-half acre lot, and the personal property in order to pay the amount of the judgment lien within ninety days. Accordingly, although Wife may in fact be able to pay the distributive award, her evidence is sufficient to raise the question of whether adjusting the award from her to Husband is necessary to offset any adverse financial consequences of using the non-liquid assets." (Citations, quotation marks, brackets, and ellipses omitted)).

As discussed above on valuation, the remainder of the finding on factor (i) is also erroneous because the marital property was not valued. The trial court found it could not value the marital equity in the home or the 401K plan. It found there was "no sufficient and competent evidence to value [Husband]'s 401K" and that the exact amount of principal remaining on the HELOC and the equity in the marital residence were also unknown. Without valuation of the marital assets, it is impossible to say if a distribution is equal or unequal. *See generally Crowder v. Crowder*, 147 N.C. App 677, 681, 556 S.E.2d 639, 642 (2001)

("The distribution of marital assets entails the court's determination of an 'equitable' division of marital property. The marital property is to be distributed equally, unless the court determines equal is not equitable." (Citation and quotation marks omitted)). Yet the court nevertheless used these unvalued marital assets in its determination that an unequal distribution was equitable, as evidenced in findings (a), (e), (f), and (i).

Once those findings discussed above are removed, we are left only with its findings: (b) that "[t]here is no obligation for support arising out of a prior marriage" and (c) that "[t]he parties were married eighteen (18) years. Both parties are in good mental health. Both parties are limited in what they may do for employment although [Husband] continues to work." These factors are essentially descriptions of the parties' circumstances and while they are relevant, they cannot, standing alone, support the trial court's conclusion that an unequal distribution is equitable. Since the court based an "unequal" distribution on marital assets that were not valued and on a misunderstanding of "liquid" assets, we hold that the trial court abused its discretion in ordering an unequal distribution.

IV. Conclusion

The trial court's order on equitable distribution is reversed and we remand to the trial court for further proceedings consistent with this opinion.[5] On remand, within 30 days after mandate issues on this opinion, either party may file a written request with the trial court for a hearing to present additional evidence or argument, and if a party files a timely request, the trial court shall hold a hearing to "to hear arguments and receive evidence from both parties on remand, in order to address the errors discussed above and to properly identify, classify, and value the parties' property as required by statutory law and case law." *Dalgewicz v. Dalgewicz*, 167 N.C. App. 412, 424, 606 S.E.2d 164, 172 (2004). If neither party files a timely written request for hearing on remand, the trial court may, in its sole discretion, determine whether to hold an additional hearing or to enter a new order based upon the evidence presented at the prior hearing.

VACATED AND REMANDED.

Judges DILLON and INMAN concur.

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5. Since Wife did not cross-appeal the denial of her claim for post-separation support, the portion of the order addressing post-separation support is not affected by this opinion and shall not be reconsidered on remand.

WINKLER v. N.C. STATE BD. OF PLUMBING, HEATING & FIRE SPRINKLER CONTRACTORS

[261 N.C. App. 106 (2018)]

DALE THOMAS WINKLER; AND DJ'S HEATING SERVICE, PETITIONER
v.
NORTH CAROLINA STATE BOARD OF PLUMBING, HEATING & FIRE SPRINKLER CONTRACTORS, RESPONDENT

No. COA17-873

Filed 21 August 2018

Licensing Boards—disciplinary action—plumbing, heating, and fire sprinkler contractors—attorney fees—N.C.G.S. § 6-19.1

In an action to discipline a contractor (petitioner) who performed work beyond his license qualification, the trial court erred in awarding him attorney fees pursuant to N.C.G.S. § 6-19.1 after his attorney successfully defended him against one of two allegations of misconduct. Based on both the plain language of the statute and legislative intent, section 6-19.1 excludes claims for attorney fees incurred in disciplinary actions by licensing boards from that statute's provisions.

Appeal by Respondent from Order entered 15 May 2017 by Judge Edwin G. Wilson in Watauga County Superior Court. Heard in the Court of Appeals 7 March 2018.

Bailey & Dixon, LLP, by Jeffrey P. Gray, for Petitioner-Appellee.

Young Moore and Henderson, P.A., by Angela Farag Craddock, John M. Fountain, and Reed N. Fountain, for Respondent-Appellant.

Nichols, Choi & Lee, PLLC, by M. Jackson Nichols, for Amicus Curiae, North Carolina Board of Architecture & State Board of Chiropractic Examiners, and Anna Baird Choi, for Amicus Curiae, State Licensing Board for General Contractors.

Janet B. Thoren, for Amicus Curiae, North Carolina Real Estate Commission.

INMAN, Judge.

The North Carolina State Board of Examiners of Plumbing, Heating & Fire Sprinkler Contractors (the "Board") appeals from an order awarding Dale Thomas Winkler d/b/a DJ's Heating Service ("Winkler")

$29,347.47 in attorneys' fees and costs pursuant to N.C. Gen. Stat. § 6-19.1. Because the statute excludes cases arising out of the defense of a disciplinary action by a licensing board, we reverse the trial court's order.

Facts and Procedural History

This is the second appeal to this Court in this case. Facts relevant to this appeal follow, but additional procedural and factual history of the litigation is included in our decision in the prior appeal. *See Winkler v. State Bd. of Examiners of Plumbing, Heating & Fire Sprinklers Contractors*, __ N.C. App. __, 790 S.E.2d 727 (2016) (Winkler I).

In April 2013, the management staff at the Best Western Hotel in Boone, North Carolina, asked Winkler, who held a Heating Group 3 Class II (H-3-II) residential license, to examine the pool heater located at the hotel. Although Winkler was licensed only to work on detached residential HVAC units, he took the job. After examining the pool heater, Winkler determined that it was not working because the gas supply had been turned off. He then located the fuel supply in the pool equipment room, turned it on, and the pool heater again worked.

Days later, on 16 April 2013, two guests died in Room 225 of the hotel, which was above the pool equipment room. Hotel management closed the room until a gas fireplace in the room could be checked for leaks. At the time, the cause of the guests' death had yet to be determined.

Hotel management hired Winkler to examine the fireplace in Room 225 and the ventilation system for the pool heater. Winkler "soaped" the gas lines on both the fireplace and the pool heater and determined there were no gas leaks. Winkler did not, however, check for carbon monoxide, because he did not have the proper equipment. Winkler told hotel management that the ventilation system seemed to be working.

Following Winkler's inspections, hotel staff reopened Room 225 in late May 2013. On 8 June 2013, a third guest died in the room and a fourth was injured.

After the third guest died, autopsies and toxicology reports for the first two guests were completed and indicated that they had died from lethal concentrations of carbon monoxide. Toxicology reports for the third and fourth guests also indicated excessive levels of carbon monoxide in their blood.

The Board undertook its own investigation after issuance of the toxicology reports. Board investigators determined that carbon monoxide from the pool heater ventilation system could enter Room 225 through openings near the fireplace logs and an HVAC unit. The investigators also observed corrosion over a substantial portion of the ventilation pipe holes for the pool heater. In connection with the Board's investigation, Winkler signed an affidavit swearing that he had never performed work for which he was not licensed.

Winkler ultimately admitted to the Board in a disciplinary licensing proceeding that he had installed a replacement HVAC system in the hotel lobby, performing work beyond his license qualification. The Board concluded that Winkler had engaged in misconduct in violation of his license and suspended his license for one year. The Board also required Winkler to enroll in several courses to remedy the deficiencies in his knowledge.

Winkler appealed the Board's decision to the Watauga County Superior Court. Following a hearing, the court affirmed the Board's decision in its entirety. Winkler then appealed to this Court on the ground that the Board lacked jurisdiction to discipline Winkler for his incompetence in working on the pool heater. He did not challenge the discipline for his misconduct related to the HVAC system in the hotel lobby.

On 20 September 2016, this Court held that the Board did not have jurisdiction to discipline Winkler for the pool heater inspection. *Winkler I*, __ N.C. App. at __, 790 S.E.2d at 739. This Court remanded the matter back to the Board for entry of a new order based solely on Winkler's misconduct related to the installation of the HVAC system. *Id.* at __, 790 S.E.2d at 739.

The Board reheard the matter, and, on 19 December 2016, issued a revised disciplinary order placing Winkler on probation for 12 months and requiring him to complete coursework and other conditions of probation.

On 24 October 2016, Winkler filed a motion for attorneys' fees and costs in Watauga County Superior Court. Winkler's motion sought fees pursuant to N.C. Gen. Stat. §§ 6-19.1 and 6-20 based on his successful defense against allegations of misconduct that the Board knew, or should have known, was outside the Board's statutory authority. The trial court entered an order on 2 May 2017 awarding Winkler $29,347.47 in attorneys' fees and costs.

The Board timely appealed and moved to stay the order awarding attorneys' fees pending the resolution of this appeal. The motion to stay was granted on 7 June 2017.

Analysis

The Board argues that the plain language of N.C. Gen. Stat. § 6-19.1 —the statute upon which Winkler based his claim for attorneys' fees— along with the legislative intent of the statute, excludes claims for attorneys' fees incurred in disciplinary actions by licensing boards from the purview of the statute. We agree.

1. Standard of Review

We review the trial court's interpretation of N.C. Gen. Stat. § 6-19.1 *de novo*. *See*, *e.g.*, *Applewood Props., LLC v. New S. Props., LLC*, 366 N.C. 518, 522, 742 S.E.2d 776, 779 (2013) (holding that questions of statutory construction are questions of law reviewed *de novo*).

2. Statutory Construction

Section 6-19.1 of the North Carolina General Statutes governs the trial court's ability to award attorneys' fees for a prevailing party in certain civil actions. The relevant portion of the statute provides as follows:

> (a) In any civil action, other than an adjudication for the purpose of establishing or fixing a rate, *or a disciplinary action by a licensing board*, brought by the State or brought by a party who is contesting State action pursuant to [N.C. Gen. Stat. §] 150B-43 or any other appropriate provisions of law, unless the prevailing party is the State, the court may, in its discretion, allow the prevailing party to recover reasonable attorney's fees, including attorney's fees applicable to the administrative review portion of the case, in contested cases arising under Article 3 of Chapter 150B, to be taxed as court costs against the appropriate agency if:
>
> > (1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and
> >
> > (2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust. . . .

N.C. Gen. Stat. § 6-19.1(a) (2017) (emphasis added). Winkler and the Board dispute whether the legislature intended for the phrase "or a disciplinary action by a licensing board" to include such proceedings within the scope of the statute, or to exclude them.

The Board argues that the phrase "other than" immediately following the phrase "any civil action" removes adjudications for establishing or fixing a rate and disciplinary actions by licensing boards from the overarching category of "any civil action" provided for by the statute.[1] This interpretation would result in the following reading: "**In any civil action**—*other than* an adjudication for the purpose of establishing or fixing a rate, *or* a disciplinary action by a licensing board—**brought by the State** . . . ." The effect of this interpretation is to exclude from the statute both adjudications for the purpose of establishing or fixing a rate *and* disciplinary actions by licensing boards.

Winkler argues, on the other hand, that the phrase "a disciplinary action by a licensing board" is a second classification, in addition to "any civil action," to which the statute applies. This interpretation leads to the following reading: "**In any civil action**—*other than* an adjudication for the purpose of establishing or fixing a rate—**or a disciplinary action by a licensing board, brought by the State** . . . ." The effect of this interpretation is to include disciplinary actions by licensing boards within the purview of the statute, while excluding only adjudications for the purpose of establishing or fixing a rate.

a. Plain Language of N.C. Gen. Stat. § 6-19.1

"The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent." *Dickson v. Rucho*, 366 N.C. 332, 339, 737 S.E.2d 362, 368 (2013) (internal quotation marks and citation omitted). The first place courts look to ascertain the legislative intent is the plain language of the statute. *See First Bank v. S&R Grandview, L.L.C.*, 232 N.C. App. 544, 546, 755 S.E.2d 393, 394 (2014) ("The plain language of a statute is the primary indicator of legislative intent." (citation omitted)); *see also N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009) ("Because the actual words of the legislature are the clearest manifestation of its intent, we give every word of the statute effect, presuming that the legislature carefully chose each word used.").

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1. This argument is joined by the North Carolina Boards of Architecture, Chiropractic Examiners, and General Contractors and the Real Estate Commission in their joint *amicus curiae* brief.

The North Carolina Supreme Court has further explained that "[a] statute must be construed, if possible, so as to give effect to every provision, it being presumed that the Legislature did not intend any of the statute's provisions to be surplusage." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 216, 388 S.E.2d 134, 140 (1990) (internal quotation marks and citation omitted).

Based on the plain language of Section 6-19.1, including not only the words but also the punctuation and ordering of phrases, we reach the conclusion that disciplinary actions by licensing boards are not within the scope of the statute.

"The North Carolina appellate courts have long held that placement of punctuation within a statute is used as a means of 'making clear and plain' the English language therein; therefore, punctuation and placement should be regarded in the process of statutory interpretation." *Falin v. Roberts Co. Field Servs., Inc.*, 245 N.C. App. 144, 149, 782 S.E.2d 75, 79 (2016) (quoting *Stephens Co. v. Lisk*, 240 N.C. 289, 293-94, 82 S.E.2d 99, 102 (1954)). "Ordinary rules of grammar apply when ascertaining the meaning of a statute, and the meaning must be construed according to the context and approved usage of the language." *Dunn v. Pacific Employers Ins. Co.*, 332 N.C. 129, 134, 418 S.E.2d 645, 648 (1992) (citations omitted).

We start by examining the language and structure of the first half of N.C. Gen. Stat. § 6-19.1, which contains the provision in dispute: "In any civil action, other than an adjudication for the purpose of establishing or fixing a rate, or a disciplinary action by a licensing board, brought by the State or brought by a party who is contesting State action pursuant to G.S. 150B-43 or any other appropriate provisions of law[.]" N.C. Gen. Stat. § 6-19.1.

The legislature's use of the word "any" before the phrase "civil action" differentiates the phrase from the two phrases following "other than"—"*an* adjudication for the purpose of establishing or fixing a rate" and "*a* disciplinary action by a licensing board"—each introduced with a singular indefinite article, respectively "an" and "a." The singular indefinite articles convey that rate cases and licensing board actions are separate and distinct members of the class of "any civil action," and therefore are excluded from the statute.

The Board argues, and we agree, that the words "other than" exclude from the broader class of "any civil actions" certain specified actions listed immediately after the words "other than." It is undisputed that the

phrase "an adjudication for the purpose of establishing or fixing a rate" is modified by the exclusionary words of "other than." It follows that the exclusionary words also modify the phrase "a disciplinary action by a licensing board," which similarly begins with a singular indefinite article. This interpretation is consistent with the rule of statutory construction that "[e]very element of a parallel series must be a functional match of the others (word, phrase, clause, sentence) and serve the same grammatical function in the sentence (e.g., noun, verb, adjective, adverb)." *Falin*, 245 N.C. App. at 150, 782 S.E.2d at 79. Had the legislature sought to include disciplinary actions by licensing boards within the scope of the statute, it would not have used a single indefinite article and a singular form of the term "action."

This interpretation is also consistent with the structure of N.C. Gen. Stat. § 6-19.1. A series of commas offsets the exclusions following "other than" from the category of actions within "any civil action": "In any civil action **[comma]** *other than* an adjudication for the purpose of establishing or fixing a rate **[comma]** or disciplinary action by a licensing board **[comma]** brought by the State . . . ." By using the last comma to separate the phrase "disciplinary action by a licensing board" from the phrase "brought by the State . . . ," the legislature extended the statutory exclusion to disciplinary actions. Had the legislature intended otherwise, there would have been no need for the third comma. This structural interpretation is consistent with prior decisions by the North Carolina Supreme Court, which have quoted N.C. Gen. Stat. § 6-19.1 in a simplified form, removing those offset exclusions as follows: "In any civil action . . . brought by the State or brought by a party who is contesting State action pursuant to G.S. 150B-43 . . . ." *See, e.g.*, *Crowell Constructors, Inc. v. Cobey*, 342 N.C. 838, 842-43, 467 S.E.2d 675, 678 (1996); *and Able Outdoor, Inc. v. Harrelson*, 341 N.C. 167, 169-70, 459 S.E.2d 626, 627 (1995). In eliminating the exclusions and not including a comma to separate "any civil action" from "brought by the State," these prior decisions illustrate the syntax of the statute—*i.e.*, the phrase "[i]n any civil action . . . brought by the State . . . " is separate and distinct from the phrase "other than an adjudication for the purpose of establishing or fixing a rate, or a disciplinary action by a licensing board[.]" This distinction exists as a means of delineating what is and is not within the scope of the statute and supports our interpretation of disciplinary actions as being categorized with the other exception to the statute.

Because the phrase "a disciplinary action by a licensing board" is designated with the indefinite article "a," and is separated from the rest

of the statute by way of commas, we hold that the plain language of the statute conveys the legislature's intent to exclude disciplinary actions by licensing boards from the purview of the N.C. Gen. Stat. § 6-19.1.

b. Statutory Interpretation of N.C. Gen. Stat. § 6-19.1

In addition to the plain language of N.C. Gen. Stat. § 6-19.1, the statutory interpretation and legislative history of the statute support excluding disciplinary actions by licensing boards from its scope.

Neither Section 6-19.1 nor Chapter 6 of the General Statutes in its entirety defines "any civil action" or "a disciplinary action by a licensing board." This Court, in recognizing a similar lack of definitions in Chapter 6 for the terms "agency" or "State action," has turned to Chapter 150B of the North Carolina General Statutes—specifically the North Carolina Administrative Procedure Act ("APA")—because of its reference in Section 6-19.1. *Izydore v. City of Durham*, 228 N.C. App. 397, 400, 746 S.E.2d 324, 326 (2013).

The APA sets forth the procedure for a party to appeal for judicial review from a final decision in a "contested case," when the party has exhausted all administrative remedies. N.C. Gen. Stat. § 150B-43 (2017). A contested case is defined as "an administrative proceeding pursuant to this Chapter to resolve a dispute between an agency and another person that involves the person's rights, duties, or privileges, including *licensing* or the levy of a monetary penalty. . . ." N.C. Gen. Stat. § 150B-2(2) (emphasis added). Licensing is defined as "any administrative action issuing, failing to issue, suspending, or revoking a license or occupational license." N.C. Gen. Stat. § 150B-2(4). Therefore, disciplinary actions by a licensing board necessarily fall within the scope of the APA's definition of a "contested case."

This Court, in *Walker v. N.C. Coastal Resources Comm'n*, 124 N.C. App. 1, 476 S.E.2d 138 (1996), addressed whether attorneys' fees may be awarded pursuant to N.C. Gen. Stat. § 6-19.1 in contested cases as defined by the APA. The Court drew a distinction between the "administrative review" portion of a case—*i.e.*, the agency proceedings—and the "judicial review" portion of a case—*i.e.*, the appeal to a general court of justice from the final administrative decision. *Id.* at 11, 476 S.E.2d at 144. *Walker* held that the "judicial review" portion of the case falls within the definition of "any civil action," and accordingly affirmed an award of attorneys' fees pursuant to N.C. Gen. Stat. § 6-19.1 for the judicial review phase of the case. *Id.* at 12, 476 S.E.2d at 144-45. However, the Court held that "an administrative hearing under G.S. 150B-22 *et seq.* is not a

'civil action . . . brought . . . pursuant to G.S. 150A-43 [now 150B-43][,]' " and therefore N.C. Gen. Stat. § 6-19.1 did not provide for an award of attorneys' fees for the "administrative review" portion of the case. *Id.* at 12, 476 S.E.2d at 145 (citations omitted) (alterations in original).

Following *Walker*, the General Assembly amended N.C. Gen. Stat. § 6-19.1, adding the following language: ". . . the court may, in its discretion, allow the prevailing party to recover reasonable attorney's ~~fees~~ fees, including attorney's fees applicable to the administrative review portion of the case, in contested cases under Article 3 of Chapter 150B, to be taxed as court costs against the appropriate agency . . . ." 2000 N.C. Sess. Law 2000-190, § 1. The result of this amendment was that, in contested cases under Article 3 of Chapter 150B—cases heard by the Office of Administrative Hearings—a trial court may award attorneys' fees for the administrative review proceeding, contrary to the holding in *Walker*.

By amending Section 6-19.1 after *Walker* to provide specifically for recovery of attorneys' fees incurred in the administrative review portions of Article 3 cases, and omitting any mention of the administrative review portions of Article 3A cases—the Article under which this case presently arises—the legislature revealed its intent not to provide for recovery of attorneys' fees incurred in disciplinary actions by licensing boards. *See, e.g.*, *N.C. Dep't of Revenue v. Hudson*, 196 N.C. App. 765, 768, 675 S.E.2d 709, 711 (2009) ("When a legislative body includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that the legislative body acts intentionally and purposely in the disparate inclusion or exclusion." (internal quotation marks, alteration, and citation omitted)).

Accordingly, we conclude that, when read as a whole and based on the legislative history of N.C. Gen. Stat. § 6-19.1, the language "a disciplinary action by a licensing board" was intended to exclude such actions from the purview of the statute.

Conclusion

For the foregoing reasons, we hold that the trial court erred as a matter of law by awarding Winkler attorneys' fees pursuant to N.C. Gen. Stat. § 6-19.1 because the language of Section 6-19.1 excludes "a disciplinary action by a licensing board" from the statute. We therefore reverse the trial court's order.

REVERSED.

Judges ELMORE and BERGER concur.

BOND v. MANFREDO No. 17-1425	Mecklenburg (15CVD5249)	Reverse in Part and Remand
BRUBACH v. PETERSON No. 17-1200	New Hanover (16CVS347)	Affirmed
BURNS v. KINGDOM IMPACT GLOBAL MINISTRIES, INC. No. 17-928	Cumberland (13CVS8726)	Modified and affirmed in part; vacated and remanded in part
CARTER v. BAUGHMAN No. 18-51	New Hanover (15CVS2192)	Appeal dismissed.
DA SILVA v. WAKEMED No. 17-820-2	Wake (15CVS12051)	Reversed in Part; Vacated in Part; Remanded
DAUGHTRIDGE v. TANAGER LAND, LLC No. 17-554	Halifax (15CVS1085)	Affirmed
DAVFAM, LLC v. DAVIS No. 18-43	Alleghany (16CVS89)	Affirmed
EMERT v. SMITH No. 17-1121	Mecklenburg (14CVS5143)	Affirmed
GAUNT v. GUY M. BEATY & CO., INC. No. 17-851	Rowan (16CVS2309)	Affirmed
IN RE A.H. No. 18-207	Yadkin (16JA7)	Affirmed
IN RE I.A.B. No. 18-40	Cumberland (14JT128)	Affirmed
KHAJA v. HUSNA No. 17-763	Wake (11CVD16365)	Affirmed
KOZEC v. MURPHY No. 17-919	Wake (10CVD20375)	Vacated
N.C. AMBULATORY SURGICAL CTR. ASS'N v. N.C. INDUS. COMM'N No. 17-701	Wake (17CVS144)	Dismissed
PURA VIDA MGMT. CORP. v. ADIO MGMT. CO., INC. No. 17-905	Cumberland (16CVS1521)	Vacated

STATE v. ARACENA No. 17-1253	Guilford (16CRS81358) (16CRS81360)	No Error
STATE v. BATES No. 17-970	Rutherford (15CRS2289) (15CRS53380)	No Error
STATE v. CHARETTE No. 17-1238	Nash (16CRS52858)	No Error
STATE v. COLE No. 17-732	Buncombe (14CRS89850)	No error in part; Remanded in part
STATE v. COLLINS No. 17-849	Wilkes (11CRS51281-82) (11CRS51343-44)	No Error
STATE v. CONNER No. 17-1293	Watauga (16CRS50232) (16CRS576)	No Error
STATE v. CROWDER No. 17-393	Mecklenburg (14CRS200723) (15CRS19239)	No Error
STATE v. ELLER No. 17-1124	Davidson (15CRS51338)	Affirmed
STATE v. EVANS No. 17-976	Iredell (12CRS54647-48) (12CRS54927)	No Error
STATE v. HEARD No. 17-1242	Mecklenburg (15CRS205783-785) (15CRS205787-788)	No Error
STATE v. LONG No. 17-1291	Dare (15CRS50302)	No Error
STATE v. McMILLAN No. 17-1305	Cumberland (15CRS55431-32)	No Error
STATE v. SANDERLIN No. 17-1363	Chowan (13CRS50583)	Affirmed

STATE v. WHITFIELD No. 17-184	Cabarrus (13CRS54958) (13CRS54961) (13CRS54980) (13CRS54981)	Vacated and Remanded for New Trial as to defendant Whitfield; No Error in Part, Remanded for Clerical Error in part as to defendant Banner
STATE v. WOLFE No. 17-909	Watauga (16CRS50635)	NO PREJUDICIAL ERROR.
WHITMORE v. WHITMORE No. 17-988	Camden (15CVD59)	Affirmed

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